SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 237.

W. L. WELLS COMPANY, PETITIONER,

vs.

GASTONIA COTTON MANUFACTURING COMPANY.

BRIEF FOR PETITIONER.

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(19,312.)

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Issues Relating to Jurisdiction.

The issues relating to the jurisdiction here presented are sharply and unmistakably defined, and the principles involved are, we respectfully submit, not only distinctively elemental, but unusually simple, considering the bulk of the record and the surprising result reached.

We will endeavor to state them briefly and concisely.

FIRST.

The plaintiff is unquestionably in possession of a charter obtained under the general laws of the State of Mississippi, in the form prescribed and containing only provisions authorized by said laws, properly and duly approved by the governor of Mississippi, with the great seal of that State attached, and has been undeniably doing business as a buyer

and seller of cotton for several years, using the franchises conferred by, and claiming to have been regularly organized under said charter, and the defendant is a corporation organized under the laws of the State of North Carolina, and engaged in the business of manufacturing cotton fabrics.

Can this defendant dealing and contracting with this plaintiff for nearly three years, comprising three cotton seasons, 1898–1899, 1899–1900, 1900–1901; buying from time to time, from plaintiff as such a corporation, cotton, upon a credit, aggregating in value many thousands of dollars; accepting, without protest or objection, invoices for such cotton from plaintiff in its corporate name; remitting plaintiff, as such corporation, many thousand dollars in settlement of cotton so purchased; conducting a voluminous correspondence with plaintiff as a corporation; actually accounting at the closing of one season's transactions, 1898–1899, with plaintiff and paying in full, and in all instances, and at all times, recognizing plaintiff as a corporation; addressing it only by its corporate title, also always used by plaintiff; its representative and manager even *admitting* on the witness stand that he actually knew of the existence of the plaintiff; and finally, after contracting a liability to plaintiff as such corporation, under and by its corporate name, for cotton purchased and unpaid, amounting, on the 7th day of October, 1901, to $35,397.99, exclusive of interest, being the balance then due, when sued in a Federal court for said balance, escape or avoid further accountability and responsibility for this indebtedness (which must, of course, be admitted to be just, correct, and due in determining this question), by *any* suggestion or pleading, in any *manner, shape, or form, that plaintiff is not a corporation*, and therefore cannot recover from the defendant the proceeds of said cotton thus sold and delivered as a corporation, and under its corporate name by it to defendant, at the latter's special instance and request?

SECOND.

Can an attack by such a defendant, under such a state of facts, upon the corporate character of such a plaintiff be sustained in a Federal court, by any assumption that such an attack, which is intrinsically and necessarily *collateral*, becomes *direct*, because embodied in the pleadings?

THIRD.

Can a Federal court *ex mero motu* under this state of facts, with the parties plaintiff and defendant, in the attitude mentioned, relieve the defendant from liability for a just and honest debt by instituting, in a *collateral* what the State of Mississippi could *only do* in a *direct* proceeding, an inquiry into the organization of the defendant as a corporation, and adjudge it to be illegal and void, and without standing in court?

FOURTH.

Can a Federal court refuse to entertain jurisdiction of a suit by a foreign and non-resident *de facto* corporation against a resident corporation, in the district and State where defendant resides, and of which it was a citizen, to recover an indebtedness of $35,397.99 and interest, *solely* because plaintiff is a corporation *de facto*?

FIFTH.

Can a Federal court, while practically admitting "the fact that as to certain persons, and in certain transactions it (the plaintiff) may be a corporation *de facto*," yet deny hearing to such a corporation when impleading *one of these "persons" from liability growing out of these "transactions"*?

SIXTH.

Can a Federal court, in dealing with the question of its jurisdiction, ignore the fact that the defendant is estopped from denying the plaintiff's existence as a corporation, and that the plaintiff is at least a corporation *de facto*?

SEVENTH.

Can the ruling recognized by the appellate court below, that the corporate existence of the plaintiff cannot be collaterally attacked, be ignored because the plaintiff's averment that it *is* a corporation is traversed by defendant, or the doctrine maintained that in this case there is no collateral attack, for the reason that the plaintiff below "itself put that question directly in issue"?

EIGHTH.

When it must be admitted that W. L. Wells, John T. Wells, and George Butterworth applied for a charter, under the laws of the State of Mississippi, and received and accepted such charter, duly approved by the governor of the State of Mississippi, with the great seal of the State of Mississippi attached, and was duly recorded in the office of the Secretary of the State of Mississippi and in the office of the chancery clerk of Warren county, the domicile of said corporation, which charter, by its very first section, created them "a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years; shall have power to sue and be sued, contract and be contracted with; may have a corporate seal, and break and alter the same at pleasure;" and after said incorporators, on the 18th day of July, 1898, *read* and *adopted* said charter, opened books of subscription, when W. L. Wells subscribed for ten shares, John T. Wells subscribed for five

shares, and George Butterworth subscribed for five shares, all of the value of five hundred ($500) dollars each, and on the same day and at the same place held a stockholders meeting, when the said W. L. Wells, John T. Wells, and George Butterworth were elected directors, and that subsequently W. L. Wells was elected president, George Butterworth vice-president, and John T. Wells secretary and treasurer, and thereupon *did business as a corporation* for *nearly three years* with the defendant; and when the only witness upon the subject, John T. Wells, secretary and treasurer of the said corporation, swears that the capital stock subscribed for was paid for "out of the profits of the first year's business" (R., p. 20), the evidence of said profit being on the books, and the said books being introduced on the trial of this case (R., p. 17), and when it is shown indisputably that the said W. L. Wells Company made the first year about $37,000 net profits (R., p. 34), and the second year from $24,000 to $25,000 (R., p. 34), a total of about $61,000 or $62,000, and that John T. Wells, the secretary and treasurer, only drew out the first year $1,813.23 and the second year $3,008.91, a total of $4,822.14 (R., p. 34); that Mr. Butterworth, the vice-president, drew out the first year $2,343.44 and the second year $3,741.55, a total of $6,084.99 (R., p. 34), and that W. L. Wells, president, drew out the first year $238.81 and the second year $12,136.81, a total of $12,375.62, making an aggregate of $23,282.75, leaving in the treasury of the corporation at the end of the first year about $32,604.52 and at the end of the second year over $37,717.25, can it be adjudicated that the W. L. Wells Company, at the instance of the defendant, indebted to it in the sum of $35,397.99, contracted after the first year's profits had accrued and was in the treasury, or upon the suggestion of the court in considering the question of jurisdiction, is not a corporation *de jure*, because section 2 of the charter prescribed: "The capital stock of said corporation shall be $50,000, divided in shares of $500 each, and as soon as $10,000 of said stock is subscribed and

paid for said corporation shall have power to *commence business*"?

NINTH.

Can it be held that such an organization is not *even* a corporation *de facto*, at the instance of a defendant justly indebted to it, when, in addition to the facts already stated, the defendant admits in its pleadings "the said bales of cotton were duly received by the defendant, on the invoices from a corporation, or partnership styled the W. L. Wells Company" (R., p. 8), and further admits that "the sum of $7,285.46 is due on account of the purchase of said cotton," and "it is ready and willing to pay the same, in full settlement" (R., p. 9), and denies "that it owes the plaintiff (necessarily W. L. Wells Company, a corporation) anything except the said balance of $7,285.46" (R., p. 9); and when the defendant in open court, as shown by the bill of exceptions (R., pp. 15 and 16), "*admitted that it had received from a firm or corporation called the W. L. Wells Company, cotton as set forth in the complaint, and that the charges for the same were correct*, as stated in the complaint," and, after denying that the plaintiff was a corporation, and averring that a larger amount had been paid on the claim than plaintiff admitted, then further "admitted owing the balance to the firm or corporation known as the W. L. Wells Company"?

TENTH.

Can this case be treated as if a creditor of the plaintiff was denying its corporate existence, and suing W. L. Wells, John T. Wells, and George Butterworth, *not* for unpaid subscription to the capital stock, but as *partners*, and could a creditor maintain such a suit?

These questions were all in effect decided favorably to the appellant in the Circuit Court of the United States for the

Western District of North Carolina, and adversely to the appellant in the United States Circuit Court of Appeals for the Fourth Circuit, and the judgment rendered in favor of appellant, by said Circuit Court, against the said Gastonia Cotton Manufacturing Company for $39,313.88 (R., p. 11) was reversed, and the appellant, W. L. Wells Company, deprived of the right to sue as a corporation. There was another suit instituted in the said court by the said appellant, the W. L. Wells Company, against the Avon Mills, also managed by John F. Love, the manager of defendant, in which a judgment for a large amount of money was recovered, and said suit, as shown by the agreement in the record (R., p. 14), awaits the determination of this suit, it being agreed that only "one writ of error shall be taken out." So that this case practically involves two suits. The testimony of John T. Wells, secretary and treasurer, shows that the Avon mills owed the plaintiff, at the time of the trial, $26,750.36, exclusive of interest (R., p. 17).

Statement of the Case.

We append an abstract of the material facts relating to the

"Question of Jurisdiction."

W. L. Wells, who had, prior to the summer of 1898, carried on business as a cotton-buyer at Vicksburg, Mississippi, under the name of W. L. Wells and Company, and John T. Wells, who had been for years a book-keeper of the Delta Trust and Banking Company of said city, and George Butterworth, a cotton-buyer residing in Yazoo county, Mississippi, applied in April, 1898, for a charter for a corporation under the laws of the State of Mississippi, to be known as the W. L. Wells Company. This charter was duly approved by the governor of the State of Mississippi on June 1st, 1898 (R., p. 41), and he caused the great seal of the State of Mississippi to be affixed, and it was duly recorded by the Secretary of State in the book of incorporations in his office on the same day (R., p. 42) and by the Chancery Clerk of Warren county, in his office, on the 19th day of July, 1898 (R., p. 41).

On the 18th day of July, 1898, the incorporators of the W. L. Wells Company, to wit, W. L. Wells, John T. Wells, and George Butterworth, met and accepted the charter and opened books of subscription, and thereupon W. L. Wells subscribed for ten shares of stock, John T. Wells for five shares, and George Butterworth for five shares, all of the par value of five hundred dollars each, making the full amount of ten thousand dollars prescribed by the charter to be subscribed and paid (R., p. 45). On the same date a meeting of the stockholders of the corporation was held and W. L. Wells, John T. Wells, and George Butterworth were elected directors (R., p. 46). The charter is as follows:

"THE CHARTER OF INCORPORATION OF THE W. L. WELLS COMPANY.

"SECTION 1. Be it known and remembered that W. L. Wells, John T. Wells, and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

"SECTION 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business.

"SECTION 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and generally may have all powers conferred by chapter 25 of the Annotated Code of 1892, necessary and requisite to carry out the purpose of said corporation.

"SECTION 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

"The foregoing proposed charter of incorporation is respectfully referred to the honorable attorney general for his advice as to the constitutionality and legality of the provisions thereof.

"A. J. MCLAURIN, *Governor.*

"JACKSON, MISS., *April 26th*, 1898.

"The provisions of the foregoing proposed charter of incorporation are not violative of the constitution or laws of the State.

"WILEY N. NASH,
"*Attorney General.*

"JACKSON, MISS., *April —*, 1898.

"EXECUTIVE OFFICE.

"[State coat of arms.]

"JACKSON, MISSISSIPPI.

"The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

"In testimony whereof, I have hereunto set my hand, and caused the great seal of the State of Mississippi to be affixed this 1st day of June, 1898.

"[Great Seal of the State of Mississippi.]

"By the Governor: A. J. McLAURIN.

"J. L. POWER,
"*Secretary of State.*"

(R., pp. 42 and 43.)

It was shown by the testimony of John T. Wells, a witness for plaintiff (some of the facts being elicited on examination-in-chief, and others on cross-examination, and all being uncontradicted), that W. L. Wells was president, George Butterworth vice-president, and John T. Wells secretary and treasurer (R., p. 21); that the capital stock was "paid out of the profits of the first year's business" (R., p. 20), the corporation commencing business about the beginning of the cotton season, September 1, 1898.

The corporation had a seal (R., p. 26) and held several meetings in Vicksburg, at which either W. L. Wells and John T. Wells or W. L. Wells, John T. Wells, and George Butterworth were present (R., p. 26). None of the officers and directors was entitled to any salary, but received his compensation out of the profits, the president being entitled to one-half, the vice-president one-quarter, and the secretary and treasurer to the remaining one-quarter of the net profits (R., p. 29).

The president, W. L. Wells, loaned the company some money, $10,000 (R., p. 34), and furnished most of its credit (R., p. 30). Mr. Butterworth bought cotton for the com-

pany (R., p. 30), and made a trip to England in its interest (R., p. 38). John T. Wells was bookkeeper and office-man. W. L. Wells made contracts and transacted the business of the company in North Carolina.

W. L. Wells loaned the company ten thousand dollars on November 14, 1898, which was repaid June 24, 1899 (R., p. 34). The net profits of the company the first year were about $37,000 (R., p. 34), and about $24,000 or $25,000 for the second year (R., p. 34).

John T. Wells, whose share of the profits would have been about $15,000 or about $12,500 less the $2,500, the amount of his subscription to the capital stock, only drew out of the treasury the first year $1,813.23, and the second year $3,008.91 (R., p. 34), leaving a net balance due him at the end of the *first* year of over $4,900, and of the second year, after the payment of his subscription to the capital stock, of over $7,900.

George Butterworth, who, at the end of the second year, was entitled to over $15,000, and deducting the amount of his subscription, $2,500, to over $12,500, only drew out the first year $2,343.44, and the second year $3,741.55 (R., p. 34), leaving a balance due him, after the payment of his subscription to the capital stock at the end of the second year, of over $6,400, and a balance due him at the end of the first year of over $4,400.

W. L. Wells, who would have been entitled, at the end of the first year, to $18,500 of the profits, less his subscription to the capital stock of $5,000, or a total of about $13,500, only drew out the first year $238.81 (R., p. 34), and at the end of the second year, when his interest amounted to over $25,000 net, after the payment of his subscription to the capital stock, only drew out $12,136.81 (R., p. 34), leaving a balance in the treasury to which he would be entitled of over $13,000. So that it appears at the end of the first year, after deducting the amount drawn by each of the stockholders, and after deducting the $10,000 subscribed to the capital

stock, there was still in the treasury over $22,000, and with the original capital over $32,000, and this was the year in which the business was carried on with the defendant, *without any pretense on its part that the plaintiff was not a corporation, and the year in which the accounts were satisfactorily adjusted and closed.*

At the end of the second year, after deducting the subscription to the capital stock and all sums withdrawn by each of the stockholders, there was still in the treasury fully $27,000 or more, and with the capital stock over $37,000, and at the end of this season September 1, 1900, the defendant only owed plaintiff $6,998.13 (R., p. 19).

The corporation obtained money from the Merchants' National Bank of Vicksburg, owing it during the first year as high as $60,000, or more; on January 4, 1900, owing it as much as $166,000, and during the season of 1900–1901 at one time $128,000, and was still owing said bank at the time of the trial $27,100.19, exclusive of interest, but owed practically no other debts (R., p. 37).

The W. L. Wells Company did business, as stated, with the defendant, and with the Avon mills, and another mill known as the "Ozark mills," all under the management of J. F. Love, officially designated as J. F. Love, Treasurer, and it is undenied that the defendant bought cotton from the plaintiff in *its corporate* name during *the season of* 1898 *and* 1899, and that the business for that season was satisfactory, and all money due for the purchase of said cotton had been accounted for and paid.

Mr. Love, the main witness for defendant, on cross-examination (R., p. 72), is asked:

"Q. You continued to do business with W. L. Wells & Co. until the season of 1898 and 1899; when you did business with the W. L. Wells Co.?

"A. Yes sir."

He was further asked (R., p. 72):

"Q. Didn't you, on Sept. 22d, 1898, address Messrs. W. L. Wells Company, Vicksburg, Mississippi, Gentlemen, etc.? You wrote to W. L. Wells Company on September 22d?

"A. Yes sir" (R., p. 72).

"Q. Didn't you get a letter on Sept. 23rd from W. L. Wells Co.?

"A. Yes sir" (R., p. 73).

"Q. Then you knew of the existence of the W. L. Wells Company?

"A. Yes sir" (R., p. 73).

"Q. Your business had been very satisfactory with the Wells Company?

"A. Yes sir.

"Q. They bought you exactly the kind of cotton you wanted?

"A. Yes sir.

"Q. Had no complaint to make?

"A. None.

"Q. That continued through the whole dealings?

"A. Yes sir.

"Q. You wound up the season of 1898–1899 not owing anything?

"A. According to our books, yes sir" (R., p. 73).

The letters of W. L. Wells Company to John F. Love, Treasurer, contained the following letter-heads:

"W. L. Wells, President. John T. Wells, Sec't'y and Treas. George Butterworth, Vice-Pres't.

"Established 1882. Incorporated 1898.

"W. L. Wells Company,
Cotton Merchants.

"Cable address, 'Wells.'

"Yazoo City, Miss. Greenville, Miss.
"Edwards, Miss. Delhi, La.

"VICKSBURG, MISS., ——."

As shown by Record, page 48.

And on page 18, "It is admitted that all the letters that W. L. Wells Company wrote are written on this letter-head."

All the cotton sold was billed on the invoices of W. L. Wells Company, and the remittances were made to W. L. Wells Company. "*Statements of Account*" were rendered from time to time in the name of W. L. Wells Company.

These letter-heads, invoices, statements of account, were used during the entire period of the transactions between the W. L. Wells Company and defendant, embracing nearly three years, and the remittances were made during this period directly to the W. L. Wells Company.

The defendant bought cotton from the plaintiff throughout the next season, 1899–1900, and at the end of this season the Avon mills and the defendant owed the W. L. Wells Company $12,391.67, as shown by the statement rendered September 1, 1900, and the letter of W. L. Wells Company to John F. Love, treasurer (R., pp. 54 and 59), and testimony of John T. Wells (R., p. 19).

The business continued during a large part of the next season, 1900–1901, and at the time of the trial June 18, 1902, the Gastonia Manufacturing Company owed the W. L. Wells Company $35,397.99, exclusive of interest, and Avon mills owed it $26,750.36, exclusive of interest (R., p. 17).

As indicative of the real understanding of the parties during even the early part of the second season, 1899–1900, we append the following letters and telegrams:

"VICKSBURG, MISS., *November 8th*, 1899.

"*Mr. JOHN F. LOVE, Treas., Gastonia, N. C.*

"DEAR SIR: From your various letters of recent date we get the idea that you are inclined to buy your cotton this and next month. In this we have come to the conclusion that your decision is a wise one.

"From the best information we can gather about the crop, it is undoubtedly very much short of the past two, and everything looks to us like higher prices are bound to obtain later on. In short, we believe that the earlier you buy your cotton the cheaper you will get it, and we are inclined

to go right in and buy it. What say you? To do this, of course, we will have to look to you for some considerable help in the way of ready money, and while East, wouldn't it be a good idea to arrange for this?

"The banks in this section are unusually heavily loaded owing to the very rapid gathering of the cotton crop, and they are all loaded to the guards with interior cotton-buyers, and are not disposed to make any time loans. Of course, as far as our capacity goes, count on that, but it is a matter only of fifty to sixty thousand dollars, which at present prices of cotton won't go very far towards getting your supplies.

"Yours very truly, W. L. WELLS Co.

"W. L. W."

(R., p. 114.)

(*Telegram.*)

"GASTONIA, N. C., *Nov.* 10, '99.

"W. L. WELLS, *Vicksburg, Miss.*

"Letter received; buy cotton quick as possible; write occasionally.

"JOHN F. LOVE, *Treas.*"

(R., p. 114.)

"GASTONIA, N. C., *November 10th*, 1899.

"THE W. L. WELLS Co., *Vicksburg, Miss.*

"GENTLEMEN: Your long-looked-for letters to hand this morning, and in reply we immediately wired you to buy cotton, and let us hear from you occasionally, and send you the confirmation of the same.

"It has been our opinion for some days that we would see better prices; our goods are steadily advancing, and the demand is enormous.

"Buy our cotton as soon as possible, and we will make arrangements about money, and think we can get all we want at any time. Buy cotton, and send us invoices and letters telling us what you are doing and expect to do, and we will make our arrangements accordingly.

"We remain, in haste, awaiting your further favors,

"Yours very truly, JOHN F. LOVE, *Treasurer.*"

(R., p. 115.)

"VICKSBURG, MISS., *November 13th*, 1899.

"Mr. JOHN F. LOVE, *Treasurer, Gastonia, N. C.*

"DEAR SIR: We have yours of the 10th. It looks to-day like our delay in buying your cotton has been your good fortune. At all events it would appear that you have lost nothing, and likely otherwise. However, we don't think it a good idea to bet on the market going down much, nor at the same time would we advise rushing and buying too fast, but rather a happy medium between the two extremes.

"Now, don't let us annoy you about money matters, but you don't seem to get quite the idea we wish to convey. It is this: Up to date we have shipped you in round figures $65,000.00 of cotton, which is about our capacity, without borrowing from our banks, and this we don't care to do for reasons given in our last. Now, what we want you to do is to arrange for money so we will not have to carry you for exceeding, say, sixty to seventy thousand dollars.

"If you are to buy all your cotton in the next thirty to sixty days, it means an outlay of some $350,000.00 or say, practically $300,000 more than we are able to carry you for, hence we must ask that you either arrange to remit us as we buy, or let us draw at sight. We want to be very explicit about these matters, as it never hurts anybody to have a perfect understanding, but to the contrary in our opinion it is the only right way to do business.

"Yours very truly, W. L. WELLS CO.

"(W. L. W.)"

(R., pp. 115 and 116.)

The amount of cotton sold the defendant by the plaintiff, and the amount of remittances made by the defendant, as shown by Exhibit A and Exhibit B to the complaint of the plaintiff (R., pp. 5 and 6), and the correctness of the items are practically admitted by the defendant.

The first invoice for the season of 1899–1900 was dated October 19, 1899, embracing 100 bales of cotton, amounting to $3,884.32, and the last invoice of that season was dated June 22, 1900, embracing 64 bales of cotton, amounting to $3,283.18, which latter amount was paid on August 3, 1900.

The total amount shipped to the defendant for this season was 1,615 bales of cotton, evidenced by *nineteen* different invoices and aggregating $60,488.05 (R., pp. 5 and 6).

The first payment made on this account, as shown by Exhibit B (R., p. 6), dated November 17, 1899, was $9,212.72. The total remittances up to and including August 3, 1900, amounted to $54,586.67, and were evidenced by *eight* separate remittances.

Exhibit A (R., p. 5) shows that no cotton was shipped after January 1, 1901, and that the first cotton sold for the season of 1900–1901 was evidenced by invoice dated October 2, 1900, for 50 bales of cotton, amounting to $2,814.14, and from October 2 to December 18, inclusive, 974 bales of cotton were shipped, represented by *twelve* separate invoices amounting in the aggregate to $50,877.54.

The testimony of John T. Wells shows that no stock was paid for at the time of the subscription, nor any stock certificates issued or dividends declared, but, as stated by him, the capital stock was paid for out of the profits of the first year's business.

The defendant in its answer to complaint admits that the prices and weights of the cotton set forth in Exhibit A are correct, and that the "said bales of cotton were duly received by the defendant on the invoices from a *corporation* or partnership styled the *W. L. Wells Company*" (R., p. 8). It further admits it is willing to pay the sum of $7,285.46, and "denies that it owes *plaintiff* anything except said balance $7,285.46."

Before the case was tried each party stated its contention, as shown by the bill of exceptions (R., pp. 15 and 16), and the defendant's counsel stated

"that the defendant admitted that it had received from a firm or corporation called the *W. L. Wells Company* the cotton, as set forth in the complaint, and that the charges for the same were correct, as stated in the complaint, but that the defendant contended: first, that the plaintiff was not a

corporation, and, second, that there had been paid on this claim and the claim of W. L. Wells Company against the Avon Mills the sum of fifty thousand dollars ($50,000.00), and the defendant admitted owing the balance to the firm or corporation known as the W. L. Wells Company."

Here, therefore, are two distinct *admissions of record* that the defendant received the cotton from the plaintiff, *as a corporation*, and still owes a balance to the plaintiff, *as a corporation*. Defendant having refused to pay the balance claimed due by plaintiff, to wit, $35,397.99, as shown by said Exhibit A (R., p. 6), suit was instituted in the Circuit Court of the United States for the Western District of North Carolina, and judgment was recovered on June 20, 1902 (R., p. 11), by the said W. L. Wells Company against the defendant in the sum of $39,313.88.

An appeal was prosecuted to the Circuit Court of Appeals of the Fourth District, which reversed the case, upon the ground that the circuit court had no jurisdiction, and held the plaintiff could not sue in the Federal court for the recovery of this money, due and owing to it by the defendant.

ARGUMENT.

Pretermitting for the present any discussion of the rights of the plaintiff as a corporation *de jure*, which we insist the evidence establishes it to be, as will hereinafter be presented, we respectfully contend that the failure of the subscribers to pay their subscriptions to the capital stock of the plaintiff, before its commencement of business is immaterial and cannot defeat this action, and that under all the authorities, a number of them involving corporations where the subscription to capital stock had not been paid or fully paid, the plaintiff is at least:

1st. A corporation de facto.

2d. That its existence cannot be collaterally attacked.

3d. That defendant, after having contracted with it as a corporation and in the enjoyment of the fruits of such contract, cannot deny its corporate existence.

4th. That even as a corporation de facto the Federal Courts have jurisdiction, and have uniformly maintained jurisdiction of suits by and against corporations de facto.

I.

A.

The Plaintiff Is at Least a Corporation de Facto.

This court, after citing quite a number of cases, including The Baltimore & Potomac R. R. Co. *vs.* 5th Baptist Church, 137 U. S., 568–571, and also Taylor on Corporations, 4th Edition, section 146, adopts the rule maintained by those cases, and authoritatively and conclusively determines and

adjudicates the requisites to constitute a corporation *de facto* in the Federal Courts.

In Tulare Irrigation District *vs.* Shepard, 185 U. S., 113, upon which the circuit court relied, this court holds:

> "*From the authorities, some of which are above cited, it appears that the requisites to constitute a corporation de facto are three: (1) A charter, or general law, under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; (3) actual user of the corporation franchises.*" (Italics ours.)

These are *solely* and *wholly* the prerequisites, being only three, constituting a corporation *de facto* in the Federal Court, and no text-writer or any court but this can add anything thereto. This court found that the Tulare Irrigation District had complied with those *three* prerequisities, and it could not be successfully denied, we submit, that in this case the W. L. Wells Company (1) had procured a charter under the general laws of the State of Mississippi under which it might lawfully organize; (2) that it attempted to organize thereunder; that a meeting of the incorporators was held at which the charter was read and approved; that books of subscription were then and there opened, and $10,000 were then and there subscribed, $5,000 by one reputed to be worth from $150,000 to $300,000; that on the same day a meeting of the stockholders was held, and at said meeting three directors were elected, to wit, W. L. Wells, George Butterworth, and John T. Wells; that W. L. Wells was president, George Butterworth vice-president, and John T. Wells secretary and treasurer of plaintiff, and that (3) said plaintiff actually used its corporate franchises, buying and selling many hundred thousands of dollars' worth of cotton in its corporate name and capacity, thus doing a very large cotton business; that in two years it had accumulated net profits of fully $61,000, and that at the end of the first year's business, and before the debt sued on was contracted, the net profits amounted

to about $37,000, and that after deducting the $10,000 subscribed to the capital stock, and all sums withdrawn by each of the stockholders, there was still in the treasury over $22,000, and with said capital over $32,000, *and that at the end of the second year*, when the amount due by the defendant to the plaintiff *was comparatively small*, only $6,998.13, there was in the treasury of said corporation, after deducting all sums withdrawn by the stockholders and $10,000 subscribed to the capital stock, fully $27,000, and with said capital over $37,000.

The rule relating to corporations *de facto*, thus recently and explicitly stated in Tulare Irrigation District against Shepard, *supra*, we submit, should render further citation needless, but in view of the decision of the Appellate Court, which denies the right of plaintiff to recover the large amount of money due it by its debtor, we will refer in this connection to other leading cases, both in the Federal and the State courts, and in some of which, as we have already stated, it appeared that the *non-payment of the capital stock was a specific ground of attack*, as in this case.

In Whitney *vs.* Wyman, 101 U. S., 392, it appeared that the Grand Haven Fruit Basket Company had commenced business before its articles of association had been filed, as required by the statutes of Michigan, and the court below instructed the jury in substance (395):

"That if the corporation had acted as such, and exercised its franchises, then it was a corporation *de facto*, and that in such case any irregularity in its organization was immaterial."

This court said (page 397):

"The instruction given by the court to the jury with respect to acts *of user* by the corporation in proof of its existence was correct. If there was any error, it was in favor of the plaintiff."

In Close *vs.* Glenwood Cemetery, 107 U. S., 466, this court found "no stock was ever issued as provided in the charter" (p. 471), and said (p. 477):

"As no other person owned any part of the land or was entitled to a share in the corporation, the fact that no stock had been issued or divided is immaterial."

In Baltimore and Potomac Railroad Company against 5th Baptist Church, 137 U. S., 568, this court held:

"At the trial of an action of tort upon a plea of *nul tiel* corporation, evidence that the plaintiff, after filing a defective certificate of corporation under a general corporation law, acted for years as a corporation, and recovered a judgment as such in a similar action against the defendant without any objection made to its capacity to sue, is competent and *sufficient* to prove it a corporation *de facto*, and therefore entitled to maintain this action."

In Gartside Coal Company *vs.* Maxwell *et al.*, 22 Federal Rep., 197, Judge Brewer said:

"There was a corporation or what pretended to be a corporation, which purchased coal from the plaintiff, and the transaction extended through a series of years. The defendants, or the so-called corporation failed to pay—became insolvent; and this action is to charge those who were the stockholders in this supposed corporation as though they were partners; and the basis of the claim is that there was no corporation."

And he further said (page 198):

"Where a person deals with what he supposes is a corporation, what all parties think is a corporation, where he gives his credit to that supposed corporation, he cannot afterwards, when it turns out that it is not validly incorporated, turn around and say: 'Well, I dealt with this supposed corporation; I thought it was a corporation; I trusted it as a corporation; I sold goods to it as a corporation; but it seems that when it first attempted to become incorporated there was some defect or irregularity in its proceeding, so that it did

not become legally incorporated, therefore you who are stockholders will be held personally liable,'"

and he thereupon directed a judgment for the defendant.

He further said (page 197):

"It is very clear to my mind that this attempted incorporation was invalid, and that if it had ever been challenged by the officers of the State, in proper proceedings, its exercise of corporate powers would have been enjoined."

In Doyle *vs.* San Diego Land and Town Company, 46 Federal Rep., 709, "the point" was made "that the signing and acknowledgment of such articles (articles of incorporation) by an attorney-in-fact of another is of no validity."

The court said:

"Whether or not this is so, I think unnecessary to decide in this case, for the reason that the answer shows that the Kimball Bros. Water Company was a *de facto* corporation."

It is thus shown that the failure to comply with the State statute requiring that articles of incorporation should be signed and acknowledged by at least three persons does not prevent the corporation being regarded as at least *de facto*.

Where a consolidated railroad corporation of Ohio and Michigan from time of the consolidation exercised "the franchises of a consolidated corporation, without objection from the State, or the stockholders, who appeared and voted as its stockholders at its annual meetings, it is a *de facto* corporation though there was a failure to give the notice to the stockholders, or to file the certificate of consolidation as required by the Revised Statutes of Ohio, sec. 3380–3382."

Farmers' Loan & Trust Company *et al. vs.* Toledo, A. A. & N. M. R. R. Co., 67 Fed. Rep., 49.

In Andrews *et al. vs.* National Foundry and Pipe Works, Limited, and City of Oconto *vs.* Same, 77 Fed. Rep., 774, it was said:

"Finally it is suggested that, upon the theory of our opinion, the Oconto Water Company, having never issued valid stock, was without stockholders or legal organization, and had no power to give Andrews and Whitcomb a valid mortgage the existence *de facto* is unquestioned, and the existence *de jure* could be challenged only by public authority in the manner provided by law."

Judge Taft in Continental Trust Co. *et al. vs.* Toledo, St. Louis and K. C. R. Co. (9, 18, '97), 82 Fed. Rep., 642–650, says:

"It may be safely stated as the rule that when persons assume to act as a body, and are permitted by acquiescence of the public and the State to act, as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is expressed recognition by general law, such body of persons is a corporation *de facto*, although the particular person thus exercising a franchise of being a corporation may have been ineligible and incapacitated by the law to do so."

In Louisville Trust Co. *vs.* Louisville, N. A. & C. Ry. Co. *et al.*, 84 Fed. Rep., page 539, the court said:

"The sole ground of objection to the complainant's case in the court below, as set forth in the petition of appellant, was the total invalidity of the various bonds and mortgages, because the defendant corporation, which is a consolidated company, was never regularly consolidated, and that under the law of Illinois, and the decision of the Supreme Court in the case of American Loan and Trust Company *v.* Minn. & N. W. R. Co., 157 Ills., 641, a railway corporation of Illinois could not be consolidated with a railway corporation of another State."

And the court held:

"Where from the time of consolidation it exercised the franchises of a consolidated corporation without objection from the State, or the stockholders who appeared and voted as its stockholders at its annual meeting, it is a *de facto* corporation."

In Venner *vs.* Farmer's Loan and Trust Co., 90 Fed. Rep., pages 348, 353, the court said

"that the stock subscribed in the new company was subscribed by persons who neither expected nor were able to pay their subscriptions, was a fraud upon the public as well as upon the creditors of that company; but it does not affect the fact of incorporation as to those who dealt with it as a corporation."

In Deitch *vs.* Staub, 115 Fed. Rep., 309–315, the court said:

"When the directors of the Knoxville Building & Loan Association applied for an amendment to the chancery court charter under which they had been acting as a building and loan incorporation, there was a valid law under which a valid building and loan incorporation might have been organized, and a law under which any building corporation organized theretofore under either a general or special law of the legislature, or under a chancery court decree, might obtain the powers conferred upon building incorporations by the act of 1875. This condition brings the case within even those definitions of a '*de facto* corporation' which seem to hold that there can be no *de facto* corporation, unless there was a valid law under which a *de jure* corporation might have been organized."

Reference will now be made to some of the leading cases in the State Courts:

ALABAMA.

"Corporation *de facto* exists when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by law, or in other words, where there is an organization with color of law and an exercise of corporate rights and franchises."

Snider Sons' Co. *vs.* Troy, 91 Ala., 224; 24 Am. St. Rep., p. 887.

It is to be noted that this was a case in which a creditor, *and not a debtor*, made an attack upon the corporate existence, and undertook to charge its stockholders as partners. The court said:

"A corporation *de facto* has an independent status recognized by the law as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation."

And quoted the following from Fay *vs.* Noble, 7 Cush., 188:

"Surely, it cannot be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners, a liability neither contemplated nor assented to by them. The statement of the proposition carries with it a sufficient refutation."

California.

The appellate court cites Beach on Private Corporations, section 16, and that author quotes, as the authority for the doctrine announced in the text, Mockelumne Hill Mining Company *vs.* Woodbury, 14 Cal., 424; and it is therefore interesting to notice what the supreme court of California in a recent case (Martin *vs.* Deetz, 102 Cal., 55) has to say about corporations *de facto*:

"What is a corporation *de facto*? It exists where a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs, to some extent, at least, by the methods and through the offices, usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body."

GEORGIA.

The brief of appellee in opposition to the granting of the prayer of the petition in this case cites Burns *et al. vs.* Beck *et al.*, supreme court of Georgia, — Ga., page —; 10 S. E. Rep., 121—a case which, so far from affording appellee any relief, directly supports the contention of appellant. The court in that case said:

"Burns and Parkins, both being officers of the corporation, and the only stockholders therein, held out the corporation to the world as duly organized; whereas, according to the allegation of the bill, all the stock had not been subscribed for nor had 10 per cent. thereof been paid. *The corporation, therefore, was one de facto only.*" (Italics ours.)

MICHIGAN.

In Swartwout *vs.* Michigan Air-line Railroad Co., 24 Mich., 389 (cited in Tulare Irrigation District *vs.* Shepard, *supra*), it was insisted, among other things, that the meeting of the stockholders for the election of directors and permanent organization was called before the requisite amount of stock had been subscribed; that some of the subscriptions were conditional, and that in some cases the 5 per cent. prescribed by law to be paid on subscribing was not paid. The court said:

"In the case of a company organized under a special charter, proof of the charter, and of user under it, is sufficient to establish a *prima facie* right in the plaintiff to sue, and this *prima facie* case an individual could not dispute in an action where the question comes up collaterally, and when the State as a party chiefly concerned cannot be heard by its counsel, and the ruling should be the same when an attempt has been made to organize a corporation under a general law, and the question is one of exact regularity and compliance with the law."

The Merchants' & Manufacturers' Bank *vs.* Stone *et al.*, 38 Mich., 779, is a striking case, and we quote at some length the facts as shown by the report. It appeared that Stone, Livingston, and Hughes, having previously made a contract with reference to a sale of land, cutting of timber, etc., on the 20th day of September, 1871, prepared and executed articles of association under the Michigan statutes. The name was the Charles Stone Timber Company, capital stock $100,000, divided into 4,000 shares of $25 each. The articles stated the amount actually paid in was $10,000; that Livingston and Hughes each held 1,800 shares and Stone 400 shares, and that the affairs were to be managed by three directors. The articles were filed with the Secretary of the State, and also in the office of the clerk of Wayne county. Notice was published for first meeting of stockholders. Only Livingston and Hughes were present, and they agreed they would call Stone president, Hughes vice-president, and Livingston secretary and treasurer. A rough memorandum in pencil was made of such agreement, but no other or further record. No other formal or further meeting of stockholders was ever held, nor did the board of directors have a formal meeting. When they met they talked over matters, but kept no record of any proceedings. Books were kept by Livingston in Detroit; they show no stock account and no capital account, but did show a credit to Stone of $50,000, the contract price of the land, and other things sold under the contract of September 16, and also $10,000 advances.

"Nothing was ever paid in by any of the parties to the capital stock of the concern, unless what was said about putting in the Chains and Boom Co. stock can be so considered."

In this connection the language of Livingston was quoted, who said:

"The intention was that these Chains and Boom Company's stock to the amount of $10,000 at a fair valuation—

that they should constitute the first $10,000 of the capital stock paid in."

"Q. What was done then about actually putting it in?

"A. Nothing done that I particularly remember; it may be, but I am not certain.

"Mr. Stone gave Mr. Hughes an order on the secretary of the Au Sable Boom Company to transfer the stock to the Charles Stone Timber Company."

And the judge said:

"Nothing further was ever done under these articles, except that work was at once commenced by Livingston and Hughes under their contract with Stone, etc."

The note sued on was a renewal note discounted to enable the business to be carried on.

The court said:

"Certainly the evidence the bank introduced in regard to the operations of the company, the attitude it maintained, and the character in which the two concerns dealt together showed that it was a corporation *de facto*, and so acknowledged by the bank."

MINNESOTA.

"Color of an apparent organization under some charter or enabling act, does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body from being a corporation *de jure;* but if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*.

Finnegan *vs.* Noerenberg, 52 Minn., p. 239; 38 American State Reports, p. 552.

North Carolina.

In the case of Attorney General *vs.* Simonton, 78 N. C., p. 57, the court holds that if a number of persons got together and assumed the functions of a bank under the charter granted by the legislature they were bound by their acts, although no books of subscription had ever been opened, no *bona fide* capital had ever been paid in, and no organization ever effected.

New Jersey.

In Hackensack Water Company *et al. vs.* Minna De Kay *et al.*, 36 N. J. Eq., p. 548, the court said:

"The statute forbids the election of any person as a director who was not at the time *bona fide* holder of some of the stock of the corporation. The company was organized August 1st, 1873, and directors were elected August 23rd—1873—at that time very little of the stock had been subscribed for and paid in. Indeed the paid-up subscriptions to the stock were never such as to authorize organization under the act of incorporation, and although 4 of the 5 directors elected had subscribed for stock none of them had paid his subscription."

The court further said:

"It is *indisputable that the organization was illegal, and that the directors had not the legal qualifications for their offices: but it is also undeniable there was an organization in form—and that the company became a corporation de facto.* (Italics ours.)

New York.

In Eaton *et al. vs.* Aspinwall, 19 N. Y., p. 121, an attempt was made to organize the Mexican Ocean Mail and Inland Company under a statute of New York, the second section of which provides that, when 10 per cent. of the capital is *paid* in, "the persons who shall have signed and acknowl-

edged the same (the certificate of incorporation) and their successors," etc., "shall be a body politic and corporate in fact and in name;" "the company elected its officers, hired an office, and engaged in the actual transaction of business as a corporation," but the 10 per cent. of the capital stock required by the act was not paid in. The court held it was a corporation *de facto*, and further "that this corporation though not a valid corporation in the point of law may carry on its enterprises, have its day in court, and divide its revenue among the holders of the shares of its capital until the State shall interpose and ask that it be dissolved."

TEXAS.

In American Salt Company *vs.* Heidenheimer, 80 Texas, 344, 26 Am. St. Rep., p. 743, it was shown that there was a distinct violation of the law, because the statute required at least two of the subscribers to the charter must be citizens of the State, and the fact was established that none of the subscribers was a citizen, yet the court held:

"*A corporation de facto is a corporation organized and operated under color of the law, but not legally constituted. The statute of Texas requires that at least two of the subscribers to the charter of an intended corporation must be citizens of the State. Where, therefore, articles of incorporation filed in the office of the secretary of state are signed by persons none of whom are citizens of the State, the corporation is not legally constituted, but until the pretended charter is vacated it is a corporation de facto.*" (Italics ours.)

The court cites:

Merchants', etc., Bank *vs.* Stone, 38 Mich., 779, *supra.*
Fay *vs.* Noble, 7 Cush., 188.
Gartside Coal Co. *vs.* Maxwell, 22 Fed. Rep., 197, *supra.*

Clark & Marshall, in their work on Private Corporations, vol. I, pages 257 and 259, say:

"There may be a corporation *de facto*, the existence of which cannot be attacked collaterally—though the capital stock or

a certain per cent. thereof was not subscribed or paid, as required by the statute."

Citing—

Stokes *vs.* Findlay, 4 McCrary, 205; Fed. Cases, No. 13478.
Duke *vs.* Cahawba Nav. Co., 10 Ala., 82.
Bibb *vs.* Hall, 101 Ala., 79.
Lehman *vs.* Warner, 61 Ala., 455.
Canfield *vs.* Gregory, 66 Conn., 9, 17.
Union Water Co. *vs* Kean, 52 N. J. Eq., 111.

It seems to us that the erroneous conclusion reached in this case is also based upon a misapprehension of what constitutes the "capital stock" of a corporation, and that undue importance is given to a mere certificate of stock. It is not necessary to issue certificates of stock in order to make the owners of stock stockholders, nor does the validity of the corporation depend upon the mere issue of certificates of stock.

This doctrine, we submit, cannot be questioned. Mr. Cook, in his treatise on the Law of Corporations, 5th ed. (1903), vol. I, sec. 13, says:

"A certificate of stock is from one point of view a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of stock; it operates to transfer nothing from the corporation to the stockholder, but merely affords to the latter evidences of his rights."

"*It should be clearly understood that the certificate is not the stock but merely written evidence of the ownership of stock.*"

"The certificate, therefore, has value in itself as evidence, but apart from the shares which it represents it is utterly worthless. *A certificate of stock is not necessary to the complete ownership of the stock, nor is payment of the subscription necessary thereto.*"

"*It is not essential to the existence of a corporation that certificates of stock be issued. Without a certificate the stockholder has a complete power to transfer his stock, to receive dividends, and to*

vote, and he is individually liable as a stockholder." (Italics ours.)

"Stock may be transferred without a transfer of a certificate."

In the recent case of Pitsch *vs.* Krause *et al.* (supreme court of Wisconsin, January 13, 1903), 93 N. W. Rep., 9, the supreme court of Wisconsin quotes with approval some of the language of Mr. Cook above set forth.

The doctrine so inflexibly maintained in all of the above cases necessarily, in our opinion, overthrows *any contention* that the W. L. Wells Company *was not at least a corporation de facto.*

B.

The Corporate Existence of Plaintiff Cannot Be Collaterally Attacked.

The doctrine that the existence of a corporation *de facto* cannot be questioned in a collateral proceeding is maintained by this court, and from the rendition of the decision in Frost *et al. vs.* Frostberg Coal Co., 24 Howard, 217, to the present time, it has never been denied.

In that case it was insisted "that the stock of this company at the *time* of its *organization*, was held in violation" of the fifteenth section of the general act of Maryland, which provides "that when over four-fifths of the capital stock of the company to which the act applies shall become concentrated, by purchase or otherwise, in the hands of less than five persons, etc., all the corporate powers and privileges granted shall cease and determine."

This court said:

"But whether it (this four-fifths provision) does (apply), or not, *it is unimportant to determine; for conceding that it does, a private party cannot take advantage of the forfeiture, that is a question for the sovereign power, which may waive it, or enforce it, at its pleasure.*" (Italics ours.)

In The County of Macon *vs.* Shores, 97 U. S., 272 and 277, this court said:

"The objection that the corporation was not organized within the time limited by the charter is not availing. It is in fact a plea of *nul tiel corporation*. In Kayser *vs.* Trustees of Bremen (16 Mo., 88) the supreme court of the State said:

"'It cannot be shown in defense to a suit of a corporation, that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by a misuser or non-user. Advantage can only be taken of such forfeiture by process on behalf of the State instituted directly against the corporation for the purpose of avoiding its charter; and individuals cannot avail themselves of it in collateral suits until it be judicially declared.'"

In Whitney *vs.* Wyman, 101 U. S., 392–397, this court said:

"The restriction imposed by the statute is a simple inhibition. It did not declare what was done should be void, nor was any penalty prescribed. No one but the State could object. The contract is valid as to the plaintiff, and he has no right to raise the question as to its invalidity."

In New Orleans Debenture Redemption Company *vs.* Louisiana, 180 U. S., 320, on page 328 the court found the company to be "a *de facto* corporation, and those who contracted with it as such cannot set up as a defense, when sued by it upon those contracts that it was not a corporation or that its organization was a nullity. None but the State could call its existence into question."

Citing—

Chubb *vs.* Upton, 95 U. S., 665, and
Baltimore & Potomac R. R. Co. *vs.* 5th Baptist Church, 137 U. S., 571.

In Tulare Irrigation District *vs.* Shepard, 185 U. S., 1–14, this court held:

"Being a *de facto* corporation, the general rule is that none

but the State can call its existence into question. The courts of California agree that such is the rule.

"People *v.* Montecito Irrigation Co., 97 Cal., 276.
"Quint *v.* Hoffman, 103 Cal., 506.
"Cooley on Constitutional Limitations, p. 309, 6th ed."

"Where a reputed public corporation is acting under the forms of law unchallenged by the State, the validity of its organization cannot be brought into question by private parties. Neither the *nature* nor the *extent* of an *illegality* in its organization can affect its existence if it be acting under color of law, and the State makes no complaint."

Miller *vs.* Perris Irrigation District *et al.*, 85 Fed., 693.

The court, after quoting (page 698) from Dillon on Municipal Corporations, 4th ed., sec. 43*a*:

"Where a municipal corporation is acting under a color of law, and its existence is not questioned by the State, it cannot be collaterally drawn into question by private parties,"

then said:

"As to private corporations, the rule above stated has often been applied by the supreme court of California."

"Where the statute of a State authorizes the consolidation of railroad companies of the State with those of other States under certain conditions and circumstances, a consolidation of such companies creates a *de facto* corporation, even though the constituent companies do not possess the qualifications required by the statute to render the consolidated company a corporation *de jure*, and its corporate existence could only be questioned on that ground by the State."

Toledo, St. L., K. C. R. Co. *et al. vs.* Continental Trust Co. *et al.*, 95 Fed. Rep., 497.

"The legality of the organization of a corporation cannot be attacked collaterally in private suit against it, but only in a direct action by the State."

Armour *vs.* E. Bement's Sons, 123 Fed. Rep., 56.

This, as will be noticed, is quite a recent case. On page 60 the court said:

"We do not enter upon the consideration of questions raised in regard to the regularity of the organization of the new company, as affected by the suggestion that *no part of the capital stock was paid in cash*" (italics ours), a question in which plaintiff apparently has no concern, or whether in fact there was any fraud in the acquisition of the charter of the old company by the new, first because the validity of the incorporation cannot be tested in this collateral and private suit, but only in a direct proceeding by the State" (citing Morawetz on Corporations, sec. 2022).

This is also the law of the State of Mississippi, a State under whose statutes the plaintiff was created, where the contract entered into between plaintiff and defendant was to be performed, so far as payment is concerned, as the cotton was sold and shipped from that State and remittances were made to it in that State.

In Fargason *et al. vs.* Oxford Mercantile Co. *et al.*, decided by the supreme court at its March term, 1900 (78 Miss., page 65), it was charged that by the terms of the charter business could be begun when 40 per cent. of its capital stock was paid, but that the parties began business before so much had been paid and that it had never been paid; that a number of the pretended stockholders had never paid anything, their stock having been issued to them in payment of debts due them from N. H. Bryant, the principal instigator of the scheme, or as gifts from him: that only $2,500 was paid in for stock before the concern began business; that the pretended corporation, really a partnership, is insolvent, and has been so from the beginning of its business.

The court said (page 72):

"Section 5 of the charter of the company authorizes it to commence business 'when as much as 40 % of the authorized capital has been actually paid in.' It is shown that goods of the value of 50 % of it were put in. This is enough, and in

any case, this was a matter for the State, and cannot affect the rights of creditors in good faith."

The State of North Carolina, where this defendant was organized, upholds the same principle.

Elizabeth City Academy *vs.* Lindsey, 28 N. C. (6 Ired.), 476.

Navigation Co. *vs.* Neal, 10 N. C. (3 Hawks.), 520.

Turnpike *vs.* McCarson, 18 N. C. (I. D. & B.), 306.

In the early case of Rice *vs.* The Rock Island & Alton R. R. Co., 21 Ill., 93 (1884), it was insisted for the defense that $500,000 of the stock had not been subscribed, and that the stockholders, previous to the organization, created spurious and false subscriptions to the amount of the deficiency in order to effect an organization. The court, however, said:

"The party ought not to be permitted in this collateral way to question the regularity of the organization of the company. If it has assumed to exercise corporate functions before it had a right by law to do so, if it has usurped franchises not granted by the statute, that should be more properly inquired into by a direct proceeding to seize the franchises to the people, and dissolve the corporation."

This case was approved in the subsequent case of People *ex rel.* Brewster *et al. vs.* Board of Trustees of Schools, 111 Ill., 171.

The author of the American and English Enc. of Law, vol. 7, title "Corporations," 2d ed., 655, says:

DE FACTO CORPORATIONS.

"It is true as a general rule that a corporation must have a full and complete organization in accordance with the law to which it owes its origin; but when an association of persons *is found in the exercise and use of corporate franchises, under color of legal organization, in pursuance of some charter or some general law, their existence as a corporation cannot be*

inquired into collaterally." (Italics ours.) "In a direct proceeding by the Government, they may be ousted. The corporation exists *de facto*, and is subject to all the liabilities, duties and responsibilities of a corporation *de jure*."

This principle is also recognized and maintained in—

Jones *vs.* Habersham, 107 U. S., 174.
Fritts *vs.* Palmer, 132 U. S., 282, 291, 292, 293.
Moxie Food Co. *vs.* Baumbach, 32 Fed. Rep., 205.
American Cable Co., etc., *vs.* City of New York, 68 Fed. Rep., 227.
Columbia Wire Co. *vs.* Freeman Wire Co. *et al.*, 71 Fed. Rep., 302.
Young, etc., V. Lock Co. *vs.* Young, etc., Co., 72 Fed. Rep., 62.
Andrews *vs.* Pipe and Foundry Co., 77 Fed. Rep., 774.
Ryland *vs.* Hallinger, 117 Fed. Rep., 216.

The case of Smith *vs.* Sheeley, 12 Wallace, 358, has been frequently cited both by the Federal and State courts, and applies the doctrine with great clearness and force, assuming it to be settled even in a case where a bank did business under a territorial charter before said charter was approved by Congress, as the law required.

Mr. Justice Davis, speaking for the court, said (page 361):

"It is not denied that the bank was duly organized in pursuance of the provisions of an act of the legislature of the Territory of Nebraska, but it is said it had no right to transact business until the charter creating it was approved by Congress. *This is so, and it cannot legally exercise its powers until this approval was obtained; but this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is not necessary to refer to authorities to support it.*" (Italics ours.)

In view of these cases, and others that could be cited, how is it possible to maintain the proposition that a defendant,

or a court, can destroy a corporation in a collateral proceeding, when it must be *admitted that this can* only be done, if at all, by the sovereign State in a direct attack?

C.

Defendant, having contracted with plaintiff as a corporation, and is now enjoying the fruits of such contract, is estopped to deny its corporate existence.

In Casey *vs.* Galli, 94 U. S., 673 and 678, the declaration averred that "on or before the 3d of June, 1864, the Bank of New Orleans was a banking corporation, organized under the laws of the State of Louisiana, and as such carried on the business of banking until about the 1st day of July, 1871," when by virtue of the act of Congress approved June 3, 1864, it "became a national banking association under said act," under the name and style of the New Orleans National Banking Association, and carried on the business of banking until the 4th day of October, 1873, when it failed. At the date of the failure of the association the defendant was the owner of fifty shares of capital stock of the par value of $30 each, and it was claimed therefore he was liable to pay the sum of $1,500.

Among the two pleas in abatement relied upon, one averred, in substance, that there was no such corporation as the New Orleans Banking Association in existence, "because the Bank of New Orleans had no power by its charter nor authority otherwise from the State of Louisiana to change its organization to that of a national banking association," and the other that there was no such corporation in existence, because the owners of two-thirds of the capital stock of the Bank of New Orleans did not authorize the bank to be converted into a national banking association, nor to ac-

cept an organization certificate as such banking association. This court after consideration of these pleas said (p. 680):

"There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, *and is sued upon the contract, neither is permitted to deny the existence of the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith and involve a mockery of justice. Parties must take the consequence of the position they assume.*" (Italics ours.)

Citing—

Eaton *et al. vs.* Aspinwall, 19 N. Y., 119, *supra.*

Tar River Navigation Co. *vs.* Neal, 3 Hawks, N. C., 520.

And cited, among others, Missouri, Connecticut, Massachusetts, Alabama, Indiana, and Kentucky cases.

In Chubb *vs.* Upton, 95 U. S., 665–667, the court said:

"*It is settled by the decisions of the courts of the United States, and by the decisions of many of the State courts that one who contracts with an acting corporation, cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging irregularity of its organization. This was settled more than half a century since in the courts of the State of New York, and has recently been affirmed in this court.*" (Italics ours.)

In the trial of this case the defendant offered to prove, "that he was induced to purchase the stock by false representations, that he would only be compelled to pay 20 % of the amounts subscribed; and that the holders of the stock in the original company never increased their stock or authorized any one to increase it, and never sold or transferred it to the new company." This evidence was excluded.

In Whitney *vs.* Wyman, 101 U. S., 392–396 and 397, it was insisted "the corporation at the date of these letters was

forbidden to do any business, not having then filed its articles of association as required by the statute."

The court said (page 397):

"The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it—the contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity."

In Andes *vs.* Ely, 158 U. S., 312–322, this court said:

"It is objected that there was no legal incorporation of the Delhi & Middletown R. R. Co. The objection is that the statute (of New York) requires that there shall be subscribed at least $1,000 of stock for every mile of railroad proposed to be laid, and that, as appears from the articles, certain subscriptions were made on condition that the road was located through Lumberville, and others, provided the road went to Shavertown. These subscriptions being conditional it is claimed amount to nothing, and as the unconditional subscriptions are less than $1,000.00 per mile of the proposed road, it is insisted that the attempted corporation was a failure.

"*We deem it unnecessary to consider this question, for it is familiar law that one who contracts with a corporation as such, cannot afterwards avoid the obligations assumed by such contract, on the ground that the supposed corporation was not one de jure.*" (Italics ours.)

In New Orleans Debenture Company *vs.* Louisiana, 180 U. S., 320–328, it was held that—

"Those who contracted with it as such (corporation *de facto*) could not set up as a defense when sued by it upon those contracts, that it was not a corporation, or that its organization was a nullity."

And, finally, in the late case of Tulare Irrigation District *vs.* Shepard, 185 U. S., page 1, to which we have already referred, this court again gave its approval to the doctrine and in terms too clear to be affected by construction. In that

case the district had "refused to pay the bonds and denied its liability on them upon the ground that it was never legally organized as a corporation, and hence had no legal right to issue any bonds."

The court, after showing that the money arising from the sale of the bonds was used by the defendant corporation, as in this case (for it is undeniable that the defendant bought cotton from plaintiff and still owes for the same), quotes from Douglas County Commissioners *vs.* Bolles, 94 U. S., 104, 110: Common honesty demands that a debt thus incurred should be paid, and said, "That sentiment has lost no force by the lapse of time."

This rule has been undeviatingly maintained by United States circuit courts and the Federal courts of appeals:

"A person who deals with a corporation, or gives to an assumed corporation a note, cannot question the corporate existence of that party with whom he has dealt or to whom he gave his note."

Gartside Coal Co. *vs.* Maxwell *et al.*, 22 Fed. Rep., 197, *supra.*

"The law is well settled that a person who contracts with an apparent corporation as such is estopped when sued on such contract to say that the plaintiff had no corporate existence or power to make such contract."

Oregonian Railway Company, Limited, *vs.* Oregon Railway and Navigation Co. (Ore.), 23 Fed. Rep., 232, *ibid.* Judge Deady said on page 238:

"But where the law authorizes the formation and existence of the alleged corporation, with power to make the contract in question, then a party thereto ought not and cannot be heard in an action thereon by such corporation, to deny its due formation or legal existence, with the power to make said contract."

"Where a corporation fails to comply with the statutory requirements as to the payment of capital stock making annual reports, etc. that fact will not invalidate a loan made

in good faith, in the usual course of business, to such corporation."

Lippincott *et al. vs.* Shaw Carriage Company *et al.*, 25 Fed. Rep., 577.

In that case it was contended that the officers of the corporation and directors had totally disregarded the requirements of the statute:

"(1.) They failed to fix the amount of the capital stock as required by section 3857 of the Revised Statutes (of Indiana).

"(2.) The capital stock was not paid in within 18 months after the incorporation."

"Creditors of a *de facto* corporation, who dealt with it as a corporation, are estopped to deny its corporate existence for the purpose of defeating a mortgage which it executed in such capacity."

"It is not debatable but that a *de facto* corporation is estopped to deny its existence as a corporation for the purpose of defeating liability upon the contracts incurred by it while pretending to be acting as a corporation. The same estoppel extends to the stockholders of such a *de facto* organization, and to other persons who have dealt with it as such."

Toledo, St. Louis & K. C. R. Co. *et al. vs.* Continental Trust Co. *et al.*, 95 Fed. Rep., 497 and 507, *supra.*

"One who deals with a corporation as a building and loan association, becoming a stockholder and a borrower from it, is estopped to deny its character as such an association to avoid liability on his contract."

Manship *et al. vs.* New South Building & Loan Asso. *et al.*, Cir. Ct. Sou. Dist. of Miss. (7, 27, 1901), 110 Fed. Rep., 845.

"It is settled by the decisions of the courts of the United States and by the decisions of many of the State courts that one who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging irregularity of its organization."

American Alkali Co. *vs.* Campbell (Penn.), 113 Fed. Rep., 398, 405.

"A member of a building and loan association who obtains a loan from it, and executes his note and mortgage therefor, waives the right to deny the power of the association to make such loan, or to carry on the business of such association, and is estopped to set up an irregularity in its organization in defense to an action to enforce the contract."

Deitch *et al. vs.* Staub, 115 Fed. Rep., 309.

The contract sued on in this case is, as we contend, a Mississippi contract, and the Supreme Court of that State is in full accord with the Federal courts.

In the very early case of Smith *et al. vs.* Mississippi and Alabama Railroad Company (1846), 6 Smedes and Marshall, 179, it appears that the railroad company sued Smith and others on a note made by the defendants for $10,926.28, dated March 29, 1838, and payable to the plaintiffs ninety days after date. The defendants offered to prove—

"That at the ostensible commencement of the bank, and before the origin of the note sued on, but $30,000 in specie of the $100,000 required by the charter had been paid in, in specie, the residue being paid in fraudulent certificates of deposit in and the paper of other banks, and that soon after its organization the specie paid in was no longer on hand."

This proof was rejected.

The court held:

"In an action of assumpsit by a bank upon a promissory note payable to itself, it is not competent for the court, at the instance of the defendant, to inquire into the organization of the bank, or as to fraud in the taking of its stock."

In the later case of Johnston *et al. vs.* Gumbel *et al.* (November 18, 1895), 19 Sou. Rep., 100, the supreme court of Mississippi applied the same doctrine even to *creditors:*

"Creditors of a corporation having dealt with it in its corporate capacity cannot attack an assignment by it on account of irregularity in its formation."

A late California case, Weil *et al. vs.* Crittenden, July 2, 1903, 73 Pac. Rep., 238, in view of the citations by the Court of Appeals from the text of Mr. Bishop is interesting and instructive. The court said:

"We need not consider the matter of the form of denial that plaintiff was a corporation organized and existing under the laws of this State, for, in this action to recover the price of goods purchased and received by defendant from plaintiff, the former is not in a position to question the corporate capacity of the latter."

We therefore submit that the proposition that this defendant, indebted to this plaintiff for over $39,000 for cotton purchased from it in its corporate name and as a corporation, is *not estopped* from denying its corporate character, *is absolutely unsupported by any case which can be regarded as an authority.*

D.

Having thus established, as we contend, that the plaintiff is *at least a corporation de facto, that its corporate existence cannot be collaterally attacked, and that the defendant is estopped from assailing its corporate existence,* it necessarily follows that—

THE CIRCUIT COURT HAD JURISDICTION.

It seems to us that after the Federal courts of the United States have unhesitatingly taken jurisdiction over many cases involving the rights of *de facto* corporations to sue and to be sued, have rigorously and inflexibly protected their corporate existence time and time again from collateral attacks, and have maintained that such existence can only be challenged by the State in direct proceeding, and having announced, in language so plain "that he who runs may read," that a debtor of such a corporation cannot deny its

right to sue, and that common honesty requires the payment of such debt, and having invariably enforced contracts of corporations *de facto*, and in doing so necessarily assumed jurisdiction over the suits involving the integrity or validity of such contracts, a defense of the want of jurisdiction of such courts cannot now be the subject of serious argument.

If the Federal courts did not have jurisdiction in all these cases, why should they deliberately consider whether the corporation suing or being sued was *de facto* or not, declare that only the State can raise the question of the validity of the corporate existence by direct proceeding, and that the debtor was estopped from raising the question of the legality of the organization by way of defense, and then proceed to render judgment?

Can it now be gravely maintained that all of the many judgments and decrees heretofore rendered in the Federal courts in cases of this sort were, for all legal purposes, absolutely void, and that with the point squarely presented, either in the pleadings or in the argument, that the corporation whose rights were being determined *were* merely a corporation *de facto*, the courts deliberately usurped jurisdiction? But even if the courts had not been called upon to determine what constitutes a corporation *de facto*, its inviolability to collateral attack, and the right of its debtors to attack its corporate existence, yet, if it had been an undeviating practice of the Federal courts to hear and determine cases where it clearly appears the rights of a *de facto* corporation and of its debtors and creditors were involved, although the fact that it was a *de facto* corporation was not specifically mentioned in the pleadings, arguments or opinions, we respectfully submit that such *a practice so long in force would now preclude* a defense of a want of jurisdiction. But we maintain that the *question* of jurisdiction was not only impliedly and passively decided by the courts when it assumed jurisdiction over the merits of these cases, but has been expressly considered and sustained.

The Supreme Court of the United States in Frost *vs.* Frostberg Coal Co., 24 Howard, 278 *supra*, decided 16th of December, 1860, said:

"*The courts are bound to regard it (a corporation irregularly organized and therefore a corporation de facto) as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the Government that created it.*" (Italics ours.)

Thus the Supreme Court said, The *courts*, not the *State courts*, but necessarily the *Federal courts*, are *bound to* regard such corporations as corporations, and although over two score years have elapsed since the date of that decision, there is nothing in the Federal Reports, which we have been able to discover, that limits or modifies that doctrine.

In Smith *vs.* Sheeley, 12 Wallace, 358, *supra*, it is said:

"*Conceding the bank to be guilty of usurpation, it was still a body corporate de facto, exercising at least one of the franchises which the legislature attempted to confer upon it.*" (Italics ours.)

And also said that this bank "could not legally *exercise* its powers until this approval was obtained," but authoritatively declared "this defect in its constitution cannot be taken advantage of collaterally," and the necessary effect of the decision is *to directly maintain* the jurisdiction of the Federal court and to deny to the *court* and the litigant the right to inquire into the existence of a corporation *de facto*.

The point was directly presented also in Blackburn *vs.* Selma, etc., R. R. Co., 2d Flipp, 525 (Fed. Cases, No. 1467). There defendant sought to evade the jurisdiction of the Federal court upon the ground that it was not regularly organized as a corporation.

The court said:

"It is claimed that the question here is one of jurisdiction, and therefore this doctrine of estoppel does not apply, however it may be in a case where the defense is *non est factum* or some other plea to the merits. * * * We cannot see

why this estoppel is not as conclusive to support the jurisdiction as to support the contract. If a body of citizens shall assume to act as a Tennessee corporation, keep its headquarters and principal offices here as this did, execute bonds and mortgages, including property lying in Tennessee, and reciting and showing its Tennessee charter and the legislature as a part of its authority to do these acts, we do not see why its estoppel by them to deny its Tennessee citizenship as well when the Tennessee jurisdiction depends upon it as when the validity of its contract is called in question. * * * We say, then, that when parties act as a corporation in Tennessee, and claim to be a Tennessee corporation and deal as such, they are estopped to deny that the corporation is a Tennessee corporation when sued in the Federal courts of that State; and they can no more aver their non-user or non-acceptance of the charter under which they have assumed to act against the jurisdiction of the court in which the corporation is sued then they can aver the fact against the contract itself."

We also maintain that the doctrine that the Federal courts have jurisdiction over *de facto* corporations has practically received legislative recognition. Since the rendition of the decision in Frost *vs.* Frostberg Coal Co., *supra*, and Smith *vs.* Sheely, *supra*, the act of September 24, 1789, which prescribes the jurisdiction of the circuit courts of the United States, has been amended three different times, to wit, by act of March 3, 1875, c. 137; in March, 1887, c. 373; act of August 13, 1888, c. 866; and as these later acts were passed long after the Federal courts had assumed jurisdiction of corporations *de facto*, and as Congress did not expressly deny this right of the Federal court, it must be assumed, we submit, that by the enactment of these statutes Congress accepted the interpretation of the previous statute by the Supreme Court, that under said statute jurisdiction over corporations *de facto* existed, for the subsequent substantial re-enactment of the statute without rejecting such interpretation, under a familiar rule, is an adoption of that interpretation.

Dollar Savings Bank *vs.* United States, 19 Wall., 237.
Bardes *vs.* Howarden Bank, 178 U. S., 530.

The act of March 3, 1875, as amended in 1887 and 1888, gives the circuit court of the United States original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the amount in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, in which there shall be controversies between citizens of different States. It will thus be seen that the jurisdiction of the circuit courts of the United States is *concurrent* with the courts of the several States, and, of course, the State courts of North Carolina and Mississippi have jurisdiction of this controversy.

The Federal courts have given the word "citizen," as applied to corporations or *quasi* corporations, a liberal interpretation.

Mr. Carter, in his work on Jurisdiction of Federal Courts, on page 56, says:

"A majority of cases have held that what are known as joint stock companies may be treated as citizens of the State under whose laws they are organized for all purposes."

See also—

Fargo *vs.* Louisville, etc., R. R. Co., 6 Fed. Rep., 787.
B. & O. R. R. Co. *vs.* Express Co., 22 Fed. P., 404.

In Andrews Co. *vs.* Youngstone Co., 86 Fed. Rep., 585, a limited partnership, and in The Board of Chicot City *vs.* Crittenden, 94 Fed., 613, a levee board, were in each instance allowed to maintain a suit as a corporation.

In Louisville, etc., R. R. Co. *vs.* Letson, 2 Howard, 497, it was held:

"When a corporation exercises its powers in the State in which it was chartered, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction."

Again, in Kansas, etc., R. R. *vs.* Santa Fe R. R., 112 U. S., 414, this court said:

"In all cases where a Federal court can take jurisdiction of controversies between citizens, it will take jurisdiction of

controversies between corporations, and treat them as citizens of the State under whose laws they were created or continued to exist."

It may be further stated that when a corporation *de facto* exists, so far as *the court and third persons are concerned*, it possesses the powers of a *de jure* corporation.

We again refer to a California case because of the citation of the Court of Appeals of the text of Beach on Corporations, which, as we have stated, is based upon a decision of the supreme court of California.

In People *vs.* La Rue, 67 Cal., 526–530, the supreme court said:

"A corporation *de facto* may legally do and perform every act and thing which the same entity could do and perform were it a *de jure* corporation."

"As to all the world except the paramount authority under which it receives its charter, it occupies the same position as though in all respects valid, and even as against the State, except in direct proceedings to arrest its usurpation of power, its acts are to be treated as efficacious."

The doctrine is also distinctly stated in Snider's Sons' Co. *vs.* Troy, 91 Ala., 224; 24 Am. St. Rep., 887:

"Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law and governed by the same legal principles as those of the former, so long as the State acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the State, from whom is derived the right to exist as a corporation, and whose authority is usurped."

Clark & Marshall in their work on Corporations, vol. I, page 231, say:

"A *de facto* corporation has the same capacity as a *de jure* corporation of entering into contracts, and it is sufficient

therefore to show a *de facto* corporate existence in order to sustain an action by or against an association as a corporation on a note, bond or other contract."

Citing cases in Georgia, Idaho, Illinois, Indiana, Kansas, Massachusetts, Missouri, Nebraska, New York, Vermont, West Virginia, and also Dallas Co. *vs.* Huidekoper, 154 U. S., 654.

As a corporation *de facto* has thus, as against all the world except the State in a direct proceeding, the powers of a *de jure* corporation, a proposition which cannot be controverted successfully, then *in any court*, the Federal as well as State, its right to maintain an action could not be denied, even in the absence of decisive adjudications making accessible the Federal forum to this class of corporations. It seems to us clear, therefore, that even if plaintiff were not a corporation *de jure*, as we contend, it was certainly entitled to a hearing in the Circuit Court of the United States for the Western District of North Carolina, as that court held, and, being a corporation, to all intents and purposes, so far as the jurisdiction of that court is concerned, its right to recover on the merits of the controversies was manifest, for no stockholder of a corporation can, we submit, be permitted to divert the funds of the corporation without the knowledge and consent of the other stockholders, even if he could do so with such consent, to the payment of his individual debts.

(2.)

But we insist that the W. L. Wells Company, the appellant, was a corporation de jure.

The very first section of the charter of plaintiff (R., p. 42) expressly enacts that "W. L. Wells, John T. Wells, and George Butterworth, their associates and assigns, are *hereby* created a body politic and corporate, under the name and style of W. L. Wells Co., and by that name shall have

* * * power to sue and be sued, contract and be contracted with."

Section 833 of the Annotated Code of Mississippi of 1892 provides:

"And the powers therein specified (in the charter of the corporation) shall by the approval of the charter be vested in such corporation, and it shall go into operation at the time and on the terms and conditions specified."

The language in said section 1 of the charter confers, by words *in præsenti* upon the incorporators, a corporate existence, and upon the approval of the charter by the governor, construing the language of the statute literally, it would appear as if the powers specified in the charter were by said approval thereby vested in the corporation. But it is unnecessary to determine this question, because it is undisputed that the charter *was accepted* by the incorporators. In construing this charter, how can these words be ignored? The incorporators were by the very terms of the act created a body politic, with the power to sue and be sued, to contract and be contracted with, under the name and style of W. L. Wells Company. This franchise *of being a corporation* was vested in the incorporators, and gave them the right as stated to sue and be sued as such a corporation.

Mr. Thompson in his Commentaries on the Law of Corporations, section 5336, after quoting the following language from Fietsam *vs.* Hay, 122 Ill., 293:

"That a franchise, or the right to be and act as an artificial body, is vested in the individuals who compose the corporation, and not the corporation itself."

then says:

"But this is an imperfect statement of the true conclusion—which is that a *primary franchise*, that is to say the franchise of being a corporation—vests in the individuals who compose the corporation; while those *secondary franchises* which we shall hereafter see, are *vendible* by the cor-

poration, necessarily, and for that reason alone must be deemed to vest in the corporation."

This court, in Julian *vs.* Central Trust Company, 193 U. S., pp. 93, 106, quotes as follows from Memphis R. R. Co. against Commissioners, 112 U. S., 609:

"The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all of its property and all of its franchises."

It will therefore be seen that the mere ownership of property is not necessary for the maintenance of corporate existence. A corporation can dispose of all of its property at one time because it may be to its interest to do so, and then, a few months thereafter, for a like reason, purchase property again; and a dealer in cotton would find no profit, as a rule, in carrying the cotton from one season to another; it is *bought* for *sale*.

It is elementary, of course, that neither the mere purchase nor the sale of the property, as a general rule, affects the corporate existence. The right of the corporation, therefore, to exist *after the sale of all of its property* carries with it necessarily the right to do all that is proper within the limitations of its charter to maintain its existence. Although without a dollar of property, so long as it maintains its corporate existence, it has the right to sue and be sued, to contract and be contracted with, if the charter so permits.

In the case at bar, as we have shown, the franchise of being a corporation is vested in the incorporators, and by the terms of the grant they have the right as such body politic and corporate, to contract and be contracted with, and

this *right is not dependent upon any ownership of property*, either at the organization of the corporation or subsequently.

Being thus created a corporation, with such corporate powers, the plaintiff was a citizen of the State of Mississippi, and, as such citizen, had a right to sue in the Federal court in proper cases where diverse citizenship exists, as in the present instance.

The learned Court of Appeals, as is evident, gave no consideration to this imperative language of the first section of the charter.

In St. Joseph and I. R. Co. *vs.* Shambaugh, 166 Mo., 567; 17 S. W. Rep., p. 581, the court says:

"If, however, the charter confers corporate capacity without any conditions precedent, acceptance of the charter is all that need be shown. In such cases the act of incorporation brings a corporate body into existence. The act of January 22, 1857, declares that there is hereby incorporated a company called the 'St. Joseph & Iowa R. R. Co.' with a capital stock of $2,000,000, and then goes on to designate the persons who shall constitute the first board of directors. No conditions precedent are prescribed. It is a present grant of corporate powers. The corporation came into being upon the acceptance of the charter. It is true the act provides that the directors shall meet and organize—that is to say, organize as a board of directors—and shall open books of subscription to the stock; but the performance of these things, is not made a condition precedent to corporate life. They are but the powers to be exercised by the corporation."

By the acceptance of its charter the plaintiff, as a corporate body, came into existence. The opening of books of subscription and carrying on of business as the buyer and seller of cotton "are but the powers *to be exercised by the corporation" after it was a corporation*, and the failure to pay in the $10,000 could not, we submit, deprive the plaintiff of the right to sue, *any more than the entire extinguishment of all*

its property by sale, or otherwise, would prevent it appearing in court as a suitor.

In Perkins *vs.* Sanders *et al.*, 56 Miss., 733, the "charter of incorporation provided that the persons therein named, and all others who are now, or may hereafter become, associated with them, and their successors and assigns, be and they are hereby, created a body politic and corporate under the name and style of the Perkinsville Manufacturing Company." It was held:

"This was not a proposition to create a corporation upon the performance of precedent conditions, but was itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter by the corporators; and this even was unnecessary, if as it is probable the corporators had applied for the grant of the charter and thus accepted it in advance. Action under the charter would be an acceptance of it."

"The provision 'that the capital stock of said company shall amount to $60,000 * * * and that it shall be divided into shares of $100 each,' did not make the subscription of the $60,000 a condition precedent, to the organization of the company."

The court said:

"In charters which were mere propositions for the organization of a corporation, and which require certain acts to be performed precedent to the existence of the corporation, no corporation can exist, and of course no corporate act can be performed till these conditions have been complied with."

"The distinction between the two classes of charters is thus seen to be, that in the first class the charter is a mere permission on the part of the legislature for the formation of a corporation, upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until these conditions have been performed except such as are expressly permitted by the charter; and as to those acts it would be considered that the corporation has an existence before its full investiture with its corporate franchises."

"In the latter case in which is this company, the corpora-

tion is in existence for all the purposes of its creation, from the beginning, except so far as there may be restraints placed upon it by the charter, either expressly or by plain implication."

Even if this plaintiff were embraced *in the first class of cases named* by the supreme court of Mississippi, as its *charter* expressly permits "it to sue and be sued," this action could have been maintained; but the plaintiff belongs to the last class, and is a corporation "created by the very terms of the charter *eo instanti* with its acceptance by the incorporators."

It is to be noticed, also, that the Perkins case involved a proceeding by a creditor's bill against the stockholders of a corporation, to enforce the personal liability of the stockholders for the debts of the company.

That case is essentially different from the one at bar, but, nevertheless, we respectfully maintain that it is clearly an authority sustaining plaintiff's right to sue, and affords no justification for the contention of appellees.

It cannot be denied that the charter of incorporation was duly approved by the governor, and was duly recorded with the Secretary of State and in the office of the chancery clerk in the county of Warren and State of Mississippi, and was duly accepted by the corporators; that books of subscription were opened by said corporators, and that $10,000, capital stock, was subscribed, and that a stockholders' meeting was held on the very same day the corporators met, and that directors were elected, and that W. L. Wells became and acted as president, George Butterworth became and acted as vice-president, and John T. Wells became and acted as secretary and treasurer; that W. L. Wells was reputed to be worth (R., p. 29) from $150,000 to $300,000; that he loaned the company $10,000 on November 14, 1898, and it was not repaid until June 24, 1899 (R., p. 34); that John T. Wells paid for his subscription for five shares or $2,500 stock out of his "part of the profits of the first" year's business; that Mr. Butterworth paid for his $2,500 stock

in the same way, and that W. L. Wells paid for his $5,000 stock in the same manner (R., p. 26), and that at the end of the first year, and before the debt sued on was contracted, there was in the treasury of the corporation over $22,000, net profits, after deducting the $10,000 subscribed for capital stock, and all sums withdrawn by each of the stockholders, or over $32,000 with said capital, and at the end of the second season, when defendant only owed $6,998.18, there was $37,000 in the treasury.

Can it be, under such circumstances, that on the date that the debt sued on was contracted, and on the date of the filing of the suit, this corporation was not *de jure*, because section 2 of the charter prescribed "the capital stock of said corporation shall be $50,000.00, divided into shares of $500.00 each, and as soon as $10,000 of said stock is subscribed and paid for *said corporation shall have power to commence business?*"

Certainly the State, the sovereign which created this corporation, alone had the right to determine, and then only in a proper proceeding, whether this corporation was *de jure* or not, and it is hardly conceivable that if a *quo warranto* proceeding had been instituted, and it was shown that on the date of such institution the corporation had in its treasury three times the amount of the capital stock required to commence business, that a judgment of forfeiture would be rendered!

Would not the attorney general, or any other officer, suing in behalf of the State, have admitted that this corporation *had substantially complied with the provisions of its charter*, and there was no just reason, with all this money in the treasury, why it should be deprived of its prerogatives, its business wound up, and its charter seized? If the State, having the right to condone or overlook a mere failure to comply with one of the provisions of the charter, *has not challenged the existence of plaintiff, and still recognizes it for all intents and purposes as a corporation de jure*, can any court, *at the instance of a defendant*, not the State, and indebted to it

nearly four times the amount of the capital stock required to be paid, declare judicially that it is not a corporation *de jure?*

The subscriptions had been made; the largest incorporator was not only reputed to be worth from fifteen to thirty times the amount of the subscription, but had loaned to the company the full amount of the subscription; the incorporators were liable on their subscription; there were no creditors to enforce personal or other liability; before the defendant contracted these debts the capital was paid in, and therefore even the State would be in no condition to complain.

It was not necessary, according to the authorities, as we have shown, to issue stock; therefore the failure to deliver such certificates to the stockholders does not affect the question. Each stockholder had subscribed for his stock, and with his money in the treasury to pay for the stock he was entitled on his own demand for a certificate therefor.

In considering whether the plaintiff was a corporation *de jure* even so far as the State of Mississippi is concerned, the only State that could deprive it of its charter, it may be pertinent to ascertain what are the rules governing the courts, when the State in a direct proceeding insists that a charter has been forfeited.

Mr. Freeman, in his extended note to State *vs.* Atchison, etc., R. R. Co., 8 American State Rep., 181, 182, and 183, says:

"*Courts proceed with caution in proceedings to declare forfeitures. It is not every excess of power, nor every omission of duty, that is a cause of forfeiture of the charter of a corporation.*

"*Courts act with extreme caution in proceedings which have for their object the forfeiture of corporate franchises.*"

Page 182:

"*A substantial performance of conditions imposed upon the corporation is all that is required.*

"Furthermore, *only such acts or omissions are a cause of forfeiture as concern matters which are of the essence of the contract*

between the State and the corporation, or in other words, in which the public have an interest."

Page 183:

"It is a further rule that, to work a forfeiture of the franchises of a corporation, there must be a willful abuse or improper neglect, or something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power." (Italics ours.)

Citing—

Angell & Ames on Corporations.
Boone on Corporations.
Morawetz on Corporations.
Waterman on Corporations.
Field on Corporations.

Attention may also be called to the fact that Mr. Freeman cites several Mississippi cases; but the decisions of the supreme court of the State of Mississippi, under whose laws the W. L. Wells Company was created and which alone could recall the grant of corporate franchise, must control in the determination of the question. In State *vs.* Commercial Bank of Manchester, 13 S. & M., 569 and 578, the court said:

"Every suspension of the use of its franchises for a limited time, does not amount to a breach of condition and consequent ground of forfeiture. A reasonable allowance must be made for peculiar circumstances and exigencies. A substantial compliance is all that is required. The fluctuations of commerce may sometimes make it incumbent on a bank to curtail its discounts, or entirely to suspend them, in order to preserve its integrity. The less is thus sacrificed to the greater. The furnishing of a sound and convertible medium of currency is the primary object in the incorporation of banks; the accommodation of those who deal with them, and the benefit of the stockholders are the secondary objects. It is essential to their preservation and safety, that they should cease to issue a circulation, when they have not the means to redeem it. It is right for them to withhold for a time,

until they can gather strength for subsequent operations. Hence expansions and contractions are inseparably interwoven with the banking system. It has its seed-time and its harvest. A reasonable discretion must therefore, of necessity, be allowed to a corporation in the exercise of these powers, on which its very existence depends. It is by no means easy to draw a line which would define the boundary between legitimate acts of prudence, and those which would be an abuse of its franchises. Each case must rest somewhat on its own circumstances."

And the court in that case held that an assignment by a bank to trustees of its assets to pay its debts, where it was made "for the purpose of collecting its debts, paying its own liabilities, and then paying the surplus to the stockholders, "did not authorize the forfeiture of the charter," *although the proceeding was direct, and instituted by the State.* In the later case of Harris, Attorney General, *vs.* Mississippi Valley and Ship Island R. R., 51 Miss., 602, the court held:

"It is not every excess of power, nor every omission of duty that produces the effect of forfeiting a charter. The public must have an interest in the act done, or omitted to be done. If it is confined to the corporation, and in nowise affects the community, it should not be considered as of those conditions upon which the grant is made. The *injunction of the legislature to the courts is to construe the charter favorably and liberally* for the corporation, so as to carry out its purposes. In order to a forfeiture, there must be something wrong done, arising from willful abuse or improper neglect.

"Courts will proceed with extreme caution in proceedings which have for their object the forfeiture of corporate franchises, nor will it be visited except for a plain abuse of power, by which the corporation fails to fulfill the design and purpose of its organization. The acts of misuser, or nonuser, must be touching matters which are of the essence of the contract between the sovereign and the corporation, and they must be willful and repeated.

"A failure of the railroad company to elect directors does not work a dissolution of the corporation, as the old board hold over until their successors are elected and qualified,

and though they may not have had any election since the date of the amended charter it is not dissolved until it has lost its power to perpetuate itself. So long as there remains the capacity of reviving restoration it is not dead."

We therefore submit, *in view of these binding cases*, that if the State of Mississippi, through its Attorney General, had undertaken to call this corporation to account before the debts herein sued for were contracted, and it had been shown, as has been proven in this case, that the charter had been issued creating the incorporators a body politic, with the right to sue and be sued; that the charter had been accepted; that books of subscription were opened and the $10,000 required had been subscribed, one-half thereof by a party reputed to be worth from $150,000 to $300,000, and who in November, 1898, a few months after the acceptance of the charter, had loaned the company $10,000; that the stockholders met and elected directors; that W. L. Wells became and acted as president, George Butterworth as vice-president, and John T. Wells as secretary and treasurer; and that it carried on the business of buying and selling cotton during one season, and had paid, as testified by John T. Wells, the subscription to the capital stock out "of the first year's profits," and that there still remained in the treasury, in addition to the $10,000 capital stock, about $22,000 or more in cash, the Attorney General would not have punished the citizens of that State by depriving them of their corporate rights, and subjecting them to the expense incident to a dissolution of the corporation, and would have voluntarily dismissed the information, because:

(1.) The mere payment of cash at the inception of the organization was not a matter of grave public importance, and its subsequent payment relieved the stockholders from any fault.

(2.) It did not affect the community.

(3.) It was not willful and repeated.

(4.) It was not of the essence of the contract with the sovereign.

(5.) The charter must be construed favorably and liberally for the corporation.

(6.) It is a mere technical matter, and would not have been visited with such dire punishment as the extinguishment or death of the corporation.

Even if the State of Mississippi had the absolute right to declare a forfeiture under the facts mentioned, it also had an *undoubted* right to waive the forfeiture.

Mr. Cook, in his work on Corporations, vol. 2, section 636, 5th ed., says "the State may waive its right to forfeit a charter," and who would doubt *that under these circumstances* the State would have waived such a right?

Certainly, until the State had acted and indicated whether it desired to waive or condone a fault of the character mentioned, no one else has the right to anticipate the purpose or action of the State! Besides, it was discretionary with the State to determine in a direct proceeding to adjudicate a forfeiture, whether or not one or more franchises enjoyed by the corporation should only be annulled, and permit the charter in all other respects to remain unimpaired.

Cook on Corporations, *supra*, section 633, says:

"Taking up first the judgment of *quo warranto* it seems that the judgment in an ordinary *quo warranto* proceeding may be either a forfeiture of all the corporate franchises and of the charter, or may be a forfeiture only of the right to do the illegal acts, and that it is within the discretion of the court to say which judgment shall be rendered."

Under this authority it would, we submit, be proper for the court in a direct proceeding to simply prohibit the W. L. Wells Company from attempting to buy and sell cotton until

the $10,000 *was paid in*, and permit its charter to remain for every other purpose, especially to collect debts due it, in full force and effect.

We maintain, therefore, that *until the State has indicated its displeasure*, or *sought in some manner to punish this corporation*, the courts will uphold the integrity of this organization and declare it a corporation *de jure*.

(3.)

Having thus demonstrated, we submit, *each* of a number of distinct principles of law which sustain the circuit court in retaining jurisdiction, it seems proper to deferentially and respectfully consider some of the points raised in the *opinion of the learned Courts of Appeals*.

The Appellate Court, as we understand the opinion, would have regarded the plaintiff as a corporation *de facto*, and permitted it to sue for this money justly due it, had the court reached the conclusion that the attack on the corporate existence of the plaintiff was collateral, and not direct.

The court says:

"It will be noticed that in all cases in which suits by or against *de facto* corporations were sustained, the ruling is that the corporate existence cannot be collaterally attacked, and in the case before us there is no collateral attack. The plaintiff below put that question directly in issue."

We respectfully contend that the Court of Appeals confounded a principle of law with a form of procedure. *An attack is collateral when not made by the sovereign.* A plea of *nul tiel* corporation, or want of jurisdiction, cannot convert that which is essentially and intrinsically collateral, into a direct attack.

Mere pleadings are ineffectual in any attempt to create rules of law. That is a province of the legislatures, and the highest judicial tribunals.

The court further said:

"When a complainant comes into the circuit court of the United States as complainant, and seeks to sustain the jurisdiction by virtue of its citizenship, it must establish that right in itself and show the credentials of its birth and existence. The fact that as to certain persons and certain transactions it may be a corporation *de facto* is not enough."

We respectfully maintain we have shown that the concluding sentence is not based upon authority. If the corporation is *de facto* to "certain persons and in certain transactions," or, to give it a more concrete application in this case, if the W. L. Wells Company is a corporation *de facto*, and especially as to the Gastonia Cotton Manufacturing Company, to which it sold many thousand dollars' worth of cotton as a corporation, is a corporation *de facto*, the establishment *of that fact* is *enough* to enable it to recover the money due it in those cotton "transactions." Once establish a corporation to be *de facto*, then it is necessarily a *de facto* corporation *for all* purposes, and only the *State*, and not third persons or the courts, can attack its corporate existence.

Nor can a person contracting with such a corporation *de facto*, when it seeks to recover on such contract, plead in any guise that the corporation is only *de facto*, and in such a case a court cannot deny its jurisdiction.

To repeat our citation from the text of Clark & Marshall on Corporations, vol. I, 231—

"A *de facto* corporation has the same capacity as a *de jure* corporation to enter into contracts, and it is sufficient, therefore, to show a *de facto* corporate existence in order to sustain an action by or against an association as a corporation on a note, bond, or other contract, or in order to defeat an action against the stockholders or members of an association as individuals on a note, or other contract, made by them as a corporation."

Citing for the last proposition Colorado, Florida, Georgia, Maryland, Texas, Michigan, Illinois, Minnesota, Pennsyl-

vania, Nebraska, New Hampshire, New Jersey, Ohio, Vermont, and Wisconsin cases, and for the first proposition, as already shown, Georgia, Idaho, Illinois, Indiana, Kansas, Massachusetts, Missouri, Nebraska, New York, Vermont, West Virginia, and Federal cases.

To the failure to recognize or attach weight to this undoubted principle, is attributable the *erroneous conclusion* reached.

An error was also committed in holding that the payment of the $10,000 capital stock was a *condition precedent* to the granting of the franchise to carry on the business of buying and selling cotton, and in failing to uphold the first section of the charter to which we have alluded, wherein the incorporators were expressly created by words *in præsenti* "a body politic and corporate."

The court quotes from Beach on Private Corporations, section 12, page 18, as follows:

"There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made requisite to the assumption of the corporate powers. In respect to the former, any material omissions will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any forum in which the fact of incorporation can properly be called into question."

The court also quotes from the same author, on page 27:

"It is immaterial that the persons attempting incorporation have acted in good faith, and have actually carried on business under their supposed authority to act as a body corporate."

These quotations appear in section 16 of 1st edition of Beach on Private Corporations, and the first quotation is based in that edition upon Mockelumne Hill Mining Co. *vs.* Woodbury, 14 Cal., 424, to which we have already re-

ferred. We have also referred to California cases sustaining, we submit, our contention.

Mr. Beach evidently had in mind in the preparation of his text an entirely different state of facts, and was dealing with an entirely different class of corporations from that presented by this record, and his citation of the Iowa case and the California case shows that he was enunciating a principle of law inapplicable here.

It is unnecessary now to consider the proposition, what may be the effect of failure to comply with acts "declared to be necessary steps in the process of incorporation," or the ruling that "mere good faith in attempting incorporation, and actually carrying on business under its supposed authority, is immaterial in determining whether said corporation is valid." These questions cannot properly arise on this record.

The language of the text last quoted is supported by Kaiser *vs.* Lawrence Savings Bank, 56 Ia., page 104, and it may be proper to refer more at length to that case by quoting from Mr. Bishop's note

He says:

"This was an action against one of the proprietors of a savings bank to recover money deposited therein. The defense was that the bank was a corporation, and that it was sufficient in order to establish the corporate existence of the bank as against the plaintiff merely to show authority to create a corporation, a *bona fide* attempt on the part of the corporators to become incorporated, and the doing of business as a corporation; and in support of this position the defendant cited Buffalo & A. R. Co. *v.* Cary, 26 N. Y., 77; Kurtz *v.* Paola Town Co., 20 Kan., 403, and Papee *v.* Capital Bank, 20 Kan., 440.

"But the court distinguishes these cases on the ground that in them the defendant had set up the want of incorporation of the plaintiffs, thereby seeking to escape liability, while in the case at bar the defendant sets up exemption, averring that the attempt to become incorporated and the doing of business under a claim of incorporation were sufficient to create the exemption."

It will thus be seen that the Kaiser case is inferentially an authority for the plaintiff, because it recognized, at least impliedly, that a *defendant* who has contracted with an alleged corporation cannot escape liability because the corporation with which it dealt was imperfectly organized, by the very fact that it refers to cases maintaining that doctrine. It simply creates a distinction by holding that a *creditor of such* a corporation is not estopped.

The defendant in this case is of course not a creditor, but a debtor, and the Kaiser case, even if it were supported by, and not opposed to, the great weight of authority, is not in point, and therefore it affords no foundation for the judgment in this case.

Reference to several Iowa cases in this connection is relevant. In Washington College *vs.* Duke, 14 Ia., 14, it was urged that, although an attempt had been made in July, 1854, to form the corporation, yet it could not be brought into being until the articles of incorporation were duly recorded, as required by law, and this did not occur until November 12, 1858, and hence it had no power to contract, &c. The court held, under section 704 of the Iowa Code of 1851, "that no person sued on a contract with such a corporation should be permitted to set up a want of legal organization as a defense."

In McKinley-Lanning Loan and Trust Co. *vs.* Gordon, 113 Ia., 481, it appears that the plaintiff, a foreign corporation, sold land to the defendant, taking a note therefor, and the court held that the defendant was estopped from claiming plaintiff had no title, as only the State can make that defense.

The court said:

"Where plaintiff, a foreign corporation, claims a note and mortgage in suit for a part payment of land sold the defendant, the latter cannot maintain that plaintiff has no title

because plaintiff cannot hold land under the laws of the State, since that defense was available only to the State."

See also—

Watts *vs.* Equitable Mutual Life Insurance Co., 111 Ia., pp. 90 and 95.

White *vs.* Marquadt *et al.*, 105 Ia., p. 145.

Beach *et al. vs.* Wakefield, 107 Ia., p. 567.

In the latter case the following qnotation from Twiss *vs.* Association, 87 Iowa, 733, is approved:

"Where an *ultra vires* contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account. In other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate a wrong and injustice."

In Seaton *et al. vs.* Grimm *et al.*, 110 Ia., 145; 81 N. W. Rep., 225, the court held:

"A corporation's stockholders, who executed its articles of incorporation, and became officers and directors, and dealt with it as a legal entity, are estopped to deny the legality of the corporation on the ground that legal notice of its incorporation was not published."

This case was decided December 16, 1899, about eighteen years after the decision in the Kaiser case.

The court says:

"The great weight of authority, in the absence of a statute, is that where a supposed corporation is doing business as a *de facto* corporation, the stockholders cannot be held liable as partners, although there have been irregularities, omissions, or mistakes in incorporation or organizing the corporation. And the greater number of cases seem to favor the proposition that statutes such as the one we are now considering are penal in character."

The court referred to Stokes *vs.* Findlay, 4 McCrary, 205, a case in which a bank business was commenced without paid-up capital, without a sworn statement of its paid-up capital, and without a certificate of the auditor authorizing it to commence business—all things required by the statute.

Mr. Beach, however, section 13, sustains the rule for which we contend. He says:

"An association of persons assuming to act in a corporate capacity under color of authority so to do, thereby become a corporation *de facto;* and neither they themselves, nor persons dealing with them will be heard to deny collaterally their legal existence as a corporation in any action growing out of their acts or contracts in that capacity. Their *de jure* existence can be called into question only by proceedings in the nature of *quo warranto* instituted by the State. Thus when individuals have been granted a charter upon a *condition precedent* and are actually exercising corporate powers, it will be presumed as against all, except the sovereign, that the condition has been performed."

Section 14:

"The principle that the legality of corporate existence cannot be questioned collaterally, but can be impeached only by the State in direct proceedings for that purpose, applies as well to companies organized under general laws as those created by special charter."

And in the concluding sentence of section 16, from which the court quotes, he says:

"And neither the company itself, nor one who has dealt with it as a corporation, will be heard to deny the regularity of its organization."

The case of Perkins *vs.* Sanders, 56 Miss., 733, to which reference is made in the opinion, is, as we have shown, an authority for the plaintiff, and not for the defendant.

Besides, it is settled law in the State of Mississippi that the failure to pay for the capital stock cannot be questioned

by a debtor of such corporation, and can only be raised by the State.

Smith *et al. vs.* The Mississippi & Alabama R. R. Co., 6 S. and M., p. 179.

It may be further observed that under chapter 25, Annotated Code of 1892, no specified amount of capital stock is prescribed, and that section 838 is only a limitation upon the amount of property a corporation can hold.

Under this chapter articles of incorporation are prepared by the parties who desire to organize as a corporation, and the right to *determine the amount of capital stock* is vested in them. The W. L. Wells Company could have been incorporated with $100 capital, and could have commenced business with a less capital than $100. There is nothing in the statute which makes the acts of a corporation doing business with an insufficient capital void, and under such statutes, as construed by the courts, the acts of such corporation are valid as against a debtor.

In the case of Whitney *vs.* Wyman, 101 U. S., 392, already cited, the statute required the articles of association to be filed with the Secretary of State, before the corporation should commence business. The court said:

"The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object."

In Hammond *vs.* Strauss, 53 Md., page 1 (where the language prohibiting the commencement of business was more emphatic than in the present charter), the court said:

"An act of the legislature of the State of Maryland, by the first section, declared the parties therein named and their successors in office to be, and they are hereby, constituted and made a body corporate and politic, under the name and style of the Union Banking Company of Baltimore. The fourth section of this act provided that when 'twenty-five per

cent. of the minimum capital stock shall have been paid in and so certified by the majority of said corporation, to the treasurer and comptroller of the State, and a certificate of their organization transmitted to the clerk of the court of appeals to be by him recorded in his office, and *not before* shall they be entitled to all the benefits and privileges herein conveyed or intended to be conveyed.' This twenty-five per cent. was not paid in and no certificate was filed, yet the court in that case said, 'There is nothing in this language that imports a condition precedent to the existence of a corporation.' The court further said: 'As we have seen the act by its terms constitutes and declares the incorporators therein named a body corporate; and upon their acceptance of the act, if it was accepted, the corporation was brought into existence without anything more, by the force of the statute itself. There was no condition precedent prescribed to the mere existence of the corporation, after the acceptance of a charter, and in such cases it has often been decided that the corporation is *in esse*.'"

In Harrod *vs.* Hammer, 32 Wis., 162, the court said:

"The corporation was organized under chapter 73, of the Revised Statutes. It is not objected or shown that any requirement of the statute was omitted or not complied with, except only that the certificate prescribed by section 17 was not made and deposited with the secretary of state, and a duplicate with the village or city clerk, as therein directed. The only question, therefore, is whether this failure of the president and directors to make and deposit the certificate and duplicate, operated to defeat the organization or to annul the proceedings by which the corporation was brought into existence. The very words of the section are a sufficient answer—'that before any corporation, formed and established by virtue of the provisions of this law, shall commence business, the president and directors shall cause their articles of association to be published,' etc., and 'shall make a certificate,' etc. It would not be easy by any words to recognize the existence of the corporation without the publication and without the certificate, or before they are made, more clearly than has been done here. The corporate existence is clearly acknowledged, and intended to be so, and the prohibition is only against it commencing business until the requirements are complied with. It is spoken of as a corporation formed and established by virtue of the provisions of law."

In Smith *vs.* Sheeley, 12 Wallace, 358, as we have shown, the bank was without *authority to do* business, as its charter had not been approved by Congress, yet its contract was upheld, as a matter of course, and without citations of authority.

Even where there is a condition precedent the right to recover is maintained. The distinction between want of authority, and the failure to comply with the conditions precedent is graphically stated in Sherwood *vs.* Alvis, 83 Ala., 115, where a contract made by a foreign corporation in disregard of article 14, section 4, of the constitution of Alabama, which declares that no foreign corporation shall do any business in the State without having a resident agent and a known place of business, will be upheld, and that the other party to the contract "is estopped from pleading its invalidity on this account, after having received the benefits," the court said:

"*The distinction is between an entire absence of authority in the organic law itself, and the failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions.*" (Italics ours.)

"In the one case, there is want of power to act; in the other only an abuse of power conferred."

Must it not be admitted that this rule strikingly presented is eminently just and should be always enforced?

We also maintain that undue importance is attached to the words "good faith" in connection with an attempt to organize a *de facto* corporation. The definition of a *de facto* corporation by the Supreme Court of the United States in Tulare Irrigation District case, as we have stated, does not embrace the words "*good faith*," and this authority is conclusive, and is also in harmony with the leading cases in State courts.

It is true that some of the text-writers and some of the cases refer to a "*bona fide*" attempt to organize a corporation, and in Tulare Irrigation District case this court found that

there was undoubtedly "a *bona fide* attempt to organize," but unless a distinct definition is given to the words "*bona fide*," so that it can be always clearly understood what is meant when they are used by the courts, it would always be difficult to determine their applicability in considering the prerequisites of a corporation *de facto*.

If the incorporators violated a law, how can they be regarded as acting in good faith in one sense? Yet, in Sherwood *vs.* Alvis, 83 Ala., 115, *supra*, the corporation proceeded in violation of the constitution of Alabama.

In Smith *vs.* Sheeley, 12 Wallace, 358, *supra*, the bank engaged in a transaction which was upheld in violation of an act of Congress.

In Whitney *vs.* Wyman, 101 U. S., 392, the transaction under consideration violated an act of the State of Michigan.

In Hammond *vs.* Strauss, 53 Maryland, *supra*, the banking company disregarded the statute of Maryland.

In Harrod *vs.* Hammer, 32 Wis., 162, there was a failure to observe the statute of Wisconsin.

In Gumbel *et al. vs.* Johnstone, 19 Sou. Rep., 100, and in Fargason *vs.* Mercantile Co., 78 Miss., 65, the laws of the State of Mississippi were violated.

In the recent case of McCandless *et al. vs.* Inland Acid Co., supreme court of Ga., July 22, 1902, 42 Sou. East. Rep., 449, it was contended that 10 per cent. of the capital required by law to be paid in had not been paid.

The court said:

"It is no concern of a debtor of a corporation, or of a person who is wrongfully withholding property belonging to it, that it has not complied with the conditions precedent in its charter or has laid its charter subject to forfeiture by a non-user or mis-user of corporate powers."

In First Nat'l Bank of Salem *vs.* Almy *et al.*, 117 Mass., 476, it was held:

"Members of a corporation to whom a certificate of organization as a corporation has been issued by the secretary of

the Commonwealth in accordance with the statute of 1870, chap. 224, are not liable as partners, by reason of having transacted business before the whole of the capital stock has been paid in in violation of sec. 32 of that statute."

Mr. Cook on Corporations, fifth edition, section 637, 1423, note 3, says:

"Where a corporation sues for the price of articles sold, the defendant cannot set up that the plaintiff sold the articles before its capital stock was fully paid up, as required by statute."

Citing—

Chase *et al. vs.* Boston *et al.* Co., 152 Mass., p. 428.
McCord, etc., *vs.* Glenn, 6 Utah, 139.

We again quote from Clark and Marshall on Corporations, volume I, 258–259:

"There may be a corporation *de facto*, the existence of which cannot be attacked collaterally, * * * though the capital stock or a certain per cent. thereof was not subscribed or paid, as required by the statute."

We have also cited Michigan and Illinois cases where the capital stock was not paid.

In American Salt Co. *vs.* Heidenheimer, 80 Texas, 344, *supra*, the articles of incorporation were signed by persons none of whom were citizens of Texas, although the statute required the signatures of residents. All of these cases show direct violations of law, which the court always condoned, and necessarily held that there was not such a want of "good faith" as would justify the extinction of the corporation and a denial of justice. The term "good faith," when used in this connection, must therefore be the antithesis of "bad faith," and when the latter words are used in the sense of "moral turpitude," a premeditated design to deceive and defraud; in other words, if the W. L. Wells Company had

falsely pretended to organize, with the design and purpose to cheat and defraud its creditors, making the corporation a cloak for evil purposes, then the legality of the organization might be open to question. But there is nothing in this case to impugn its good faith or to show that it intended to defraud any person out of one dollar. There is also a vast distinction between the case at bar and those upon which it rests, and the few cases to which we will hereinafter refer, *which expressly prohibit the exercise of any corporate powers by the very terms of the statute until certain prerequisites are complied with.*

The proposition that as consent *cannot* confer jurisdiction estoppel does not, even if sound, which we do not admit, has no bearing upon any point at issue, and its consideration injects a foreign and immaterial matter into the subject under review. It could have no relevancy, we submit, unless it is conceded that logically, as well in the material world, *a foundation* can be safely built upon its *superstructure*. The basic principle here is that the plaintiff is at least a corporation *de facto*, created such by law, even without the application of the doctrine of estoppel, and if it *is* a corporation *de facto jurisdiction* necessarily exists with or without consent. Mere consent cannot create a corporation *de facto* if the prerequisites did not exist, and does not confer jurisdiction; but when a corporation *de facto* exists, either by estoppel or otherwise, *so far as jurisdiction is concerned*, it is to all intents and purposes a *corporation de jure*. This distinction was overlooked, and error therefore resulted.

The Circuit Court and the Court of Appeals not only differed about the law, but did not agree upon the facts. To show how widely divergent are the views of the two courts, we contrast them in parallel columns:

THE CIRCUIT COURT said:

"Is the W. L. Wells Company a corporation of the State of Mississippi? * * * It is the opinion of the court that the evidence is conclusive upon this point.

"The evidence on this point (that the plaintiff was a corporation) is uncontradicted, and consists of a charter duly issued under the laws of the State of Mississippi, creating a corporation to be called the W. L. Wells Company, in which W. L. Wells, John T. Wells, and George Butterworth are named as corporators, authorizing the organization of said corporation with a capital stock of $50,000, the purpose of the corporation being to deal in cotton, to begin business as such dealer when the sum of $10,000 of the capital stock was paid in. Under the authority of this act of incorporation the corporators, met, organized, and elected W. L. Wells president of the company. One of the other corporators as secretary and treasurer. Thereupon a charter or certificate of incorporation was duly issued to the said company by the proper authorities of Mississippi, and the company commenced business. The $10,000.00 of capital stock

THE COURT OF APPEALS said:

"The governor having sealed the charter, the incorporators met on 18th July, 1898, read over and adopted it. Books of subscription were then opened, and W. L. Wells, subscribed for ten shares, John T. Wells for five shares, and George Butterworth for five shares. On the same day and at the same place a stockholders' meeting was held, and W. L. Wells, John T. Wells and George Butterworth were elected directors. The meeting thereupon adjourned, and the record does not disclose whether they ever met again or not. John T. Wells, who was secretary and treasurer of the company, says, then when the stock was subscribed for nothing was paid; that he paid for the stock out of the profits of the first year, so did Butterworth, and so did W. L. Wells. Yet, he says that these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder, no stock certificate ever issued.

"He goes on to say that he never paid any cash into the Wells Co. Nor did Butterworth, nor did W. L. Wells, and that there was absolutely no capital to start with. That notwithstanding, he drew out

was not paid at first, but the undisputed testimony is that the net profits of the company for the first year of its business was $37,000 and from this amount the required $10,000 of capital stock was paid in. The dealings of defendant with the plaintiff commenced soon after the corporation was organized, but the account between them for the first year had all been settled up, and the account upon which this controversy arises is based on transactions subsequent to the first year of plaintiff's existence as a corporation, and after the $10,000, of capital stock had been paid in, so that plaintiff had not only organized as a corporation, under the provisions of law, but according to the evidence the $10,000 of capital stock had been paid anterior to the time the cause of action in this case arose. *All of the transactions which the defendant had with the plaintiff were in its corporate capacity as the W. L. Wells Company. Every letter of the plaintiff to defendant (and there are a great many of them) concerning the sale and delivery of cotton for which the plaintiff sues, is upon paper headed, 'The W. L. Wells Company, Incorporated,' and the defendants in answer to these letters, and in making orders for cotton to be shipped* $10,217.55 and Butterworth took $9,022.65. Both he and Butterworth being men of small means, having no property liable for their debts. It is very clear from this that having a charter like this conditioned upon the payment of $10,000.00 in subscriptions, then these men undertook to exercise powers in the charter without fulfilling, or attempting to fulfill, the conditions precedent in the charter. That even when they had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them, and not the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this these assumed corporators went on in business, contracted obligations in the name of the so-called corporation, which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal liability. At the same time two of them were in a business sense, irresponsible. It would seem that this transaction was an abuse of and a fraud of the law. And that Wells Company had never,

to the mills, in every instance addressed the W. L. Wells Company; the bills of the W. L. Wells Co., and the checks sent by the defendant in making payments were all payable to the said company." (Italics ours.)

and could not have any legal existence."

It is, of course, evident that *both* of these *opposing* views *cannot* be correct, and a simple analysis of the material testimony, in the light of the law applicable to this case, will show that the *circuit* court did *not* err.

The Court of Appeals admitted that John T. Wells says "that he paid for the stock out of the profits of the first year, so did Butterworth, and so did W. L. Wells."

This testimony is undisputed, nor is his further statement under oath that the profits for the first two years were over $61,000, and as the books were before the trial court (John T. Wells even referring to the pages of the ledger in his testimony, R., p. 17), it must be *conclusively presumed* that if the defendant doubted these statements a vigorous effort would have been made to impeach them, especially with the books of the corporation thus accessible.

The Court of Appeals further states:

"Yet he (John T. Wells) says these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder, no stock certificates ever issued."

None of these things *singly*, nor will *all* of them *collectively*, sustain any attack upon the corporate organization.

We again quote from Cook on Corporations, 5th edition, section 13:

"It should be clearly understood that the certificate is not the stock, but merely written evidence of the ownership of stock.

"A certificate, therefore, has value in itself as evidence,

but apart from the share which it represents, it is utterly worthless.

"It is not essential to the existence of the corporation that certificates of stock be issued. Without a certificate a stockholder has a complete power to transfer his stock, to receive dividends, and to vote, and he is individually liable as a stockholder.

"Stock may be transferred without a transfer of the certificate."

But does not the fact that *no profits were divided*, no dividends *declared*, and no money carried to the credit of any stockholder, *establish the good faith of the corporators?*

It seems to us the retention of all these profits, netting over $37,000 at the end of the second year, when the defendant only owed the plaintiff $6,998.13 (R., p. 17), after deducting all sums withdrawn by the stockholders, should not only have shielded the plaintiff from reprobation or censure, but really afforded cause for *praise*, not only from a creditor of the corporation, if there were any in existence, but certainly merited *the approval of this defendant*, for *this fact probably* enabled the *plaintiff to sell* the *defendant* such large quantities of cotton upon a credit, *the proceeds of which it still owes and still enjoys.*

The Court of Appeals referred also to the amounts drawn out by John T. Wells, $10,217.55, and by Butterworth, $9,022.65. It is to be noticed that these were the *total* amounts withdrawn by these two gentlemen, and there is nothing in the evidence to show how much profits W. L. Wells Company had realized *at the end of its third* year's business. The testimony, however, shows that John T. Wells only drew out the first year $1,813.23, the second year $3,008.91, or a total of $4,822.14; that Butterworth drew out the first year $2,343.44, and the second year $3,741.55, a total of $6,084.99, and thus the aggregate amount withdrawn by these two stockholders for the first two years was only $10,907.13.

Can the fact that John T. Wells and Butterworth were "men of small means" or had "no property liable for their debts" *when the corporation was organized*, or thereafter, affect the question at issue? Whatever might have been their financial condition in 1898, in 1899, according to the *uncontradicted* testimony, John T. Wells' interest, as a stockholder, was worth, including his $2,500 subscription, $7,400, and in 1900, before all the debt sued on, except $6,998.13, was contracted, it amounted to $10,400, after deducting all he had withdrawn.

George Butterworth's interest amounted, at the end of the first year, to $6,900, including his interest in the capital stock, and at the end of the second year to over $9,100, so that Butterworth and John T. Wells were worth at the end of the second year nearly $20,000. Besides, there is nothing in this record which reflects upon the *integrity* and *capacity* of John T. Wells and George Butterworth, and the fact that they were "men of small means," at the inception of the business, did not affect their capacity or integrity, and assuredly that was a matter of no concern to this defendant.

The Court of Appeals also charges "these assumed corporators went on in business, contracted obligations in the name of the so-called corporation, which did not possess a dollar of property or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name and avoid in this way all personal responsibility."

If these corporators "contracted obligations in the name of the so-called corporation" certainly no one has the right to complain except the holder of those "obligations;" and *as there was no such holder before the court*, the relevancy of the observation is not apparent.

It was admitted by this defendant, both in its pleadings and in open court, that it, the defendant, owed a large sum of money, not to W. L. Wells individually, but to the firm or corporation of W. L. Wells Company, after deducting all it

claimed W. L. Wells owed it individually, and therefore certainly it had no interest in the question whether the W. L. Wells Company, either as a firm or a corporation, had not only contracted but was still owing "obligations" of either $1 or a $100,000.

It is also undisputed that W. L. Wells is a man of means, reputed to be worth at least from thirty times to sixty times his subscription of $5,000, and that he loaned the company in 1898 $10,000 and furnished it credit with which to start business. W. L. Wells is the man who this defendant charges has not only subscribed $50,000 to a charter of a North Carolina corporation to be formed by the manager of this defendant, but this very $50,000 was abstracted without his knowledge and consent from the assets of the W. L. Wells Company by the defendant, its excuse being that it was the property of W. L. Wells, and certainly therefore W. L. Wells' liability on his subscription for the sum of $5,000 was *a most valuable* asset at the date of the commencement of business of the W. L. Wells Company, and most assuredly furnished that company with a "mode of meeting a debt," even if there were any debts on that date or at the end of the first or second year, of which there is no proof.

It is *also undisputed and indisputable* that at the end of the very first year there was in the treasury of the company, after deducting the amount each stockholder had withdrawn, $32,000, and at the end of the second year over $37,000, and certainly all this money was "property" and furnished "a mode of meeting debts," even if it had any.

It is pertinent also to note that on November 13, 1899, *when this suit could not have been anticipated*, the W. L. Wells Co., by its letter of that date, wrote to John F. Love, Treasurer of the defendant, among other things, as follows (R., p. 115):

"Up to this date we have shipped you in round figures $65,000.00 of cotton, which is about our capacity, without borrowing from our banks, and this we do not care to do for

reasons given in our last. Now, what we want you to do is to arrange for money so that we won't have to carry you for say, to exceed $60,000 or $70,000."

This letter was signed W. L. Wells Company. That company on November 8 wrote to Jno. F. Love, Treasurer, also, among other things, as follows (R., p. 114):

"Of course, as far as our capacity goes, count on that, but it is a matter only of fifty to sixty thousand dollars, which at present prices of cotton won't go very far towards getting your supplies."

It will therefore be seen *that at a time when there was no reason for a misrepresentation*, when the defendant was receiving the benefit of the credit and capital of plaintiff by obtaining its raw material on a credit, at that time, *the plaintiff furnished* the evidence to defendant, by means of letters in the possession of defendant, that it *had then a capacity of fifty thousand to sixty-five thousand dollars, without borrowing* from the banks.

Did it not then possess "property" many times the value of a dollar, and did it not then have "modes of meeting a debt"? There can be but one answer to these questions.

It is undeniable, also, that the defendant did business with the plaintiff during the first year of the latter's corporate existence and paid it all it owed, and that in 1898, when the W. L. Wells Co. was formed and commenced business, there was no pretense whatever that W. L. Wells had subscribed for a dollar's worth of stock in the Loray mills, or in any other corporation controlled by the defendant.

Therefore *for a whole year at least* this plaintiff, as a corporation, did business with the defendant without any of its corporators being under any sort of personal liability or personal responsibility to the defendant *for a single dollar*.

We insist, also, that the very fact that the defendant owed the plaintiff the sum of $39,313.88 on June 20, 1902, for which a judgment was rendered, and that the Avon mills owed the

the plaintiff at the time of the trial $27,100.19, exclusive of interest—or a total of $66,414.07—*is conclusive evidence* that the plaintiff *did* possess "property" and did have modes "of meeting a debt."

At the time of rendition of said judgment the plaintiff had property (if the debt due by the defendant to the plaintiff is considered property) amounting to $66,414.07, and they practically owed, according to the testimony (R., p. 37), only $27,100.19, this being the debt due the Merchants' National Bank. Therefore at that time, assuming that the defendant could be made to pay its honest debts to the plaintiff, the plaintiff was worth over and above all of its debts *at least $39,313.88*. Consequently there was no reason for the "corporators to cloak their transactions under an assumed corporate name, and to avoid in this way all personal liability," for they had no personal liability, and the corporation had an abundance of means to meet its debts, and the charge, we submit, is not sustained by any evidence in this record.

It is further charged "that even when they (the corporators) had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them and not the corporation."

The right of stockholders, not receiving salaries, to be paid by the corporation of which they are stockholders money from time to time for their personal needs, when the corporation is solvent, is not open to question.

We submit that the evidence also shows that the corporators had "not ignored the corporation altogether." The proof is undisputed that *all* of the *many transactions* of this *plaintiff* with *this* defendant *were carried on in the corporate name, that name alone being used.*

The circuit court found, as the evidence establishes, "every letter of the defendant (and there are a great many of them) concerning the sale and delivery of cotton for which the plaintiff sues is upon paper headed, 'The W. L. Wells Company, Incorporated,' and the defendants, in answer to these

letters, in making orders for cotton to be shipped to the mills, in every instance addressed the W. L. Wells Company. The bills of lading for cotton shipped the defendants were made out in the name of W. L. Wells Company, and the checks sent by the defendant in making payments were all made out payable to the W. L. Wells Company." The invoices for the season 1899–1900, as shown by the exhibit in evidence (R., pp. 5 and 6), were *19 in number;* for the next season, 12. Thus there were 31 separate invoices. Remittances for the first season were 8 in number.

The evidence further shows that "statements of account" in the name of W. L. Wells Company were duly rendered to the plaintiff without objection or protest. Therefore, to sum up, it is undeniable, both from the evidence and admissions of defendant, that the plaintiff sold cotton to *the defendant* as a corporation and in its corporate name, and the defendant received it from plaintiff as a corporation and in its corporate name. Said cotton between October 19, 1899, and December 18, 1900, amounted to 2,483 bales, and was of the aggregate value of $111,365.59, and therefore, so far as the transactions upon which this suit is based are concerned, neither "the corporators" nor the defendant "ignored the corporation."

It is significant to note in this connection that the defendant knew and acted in other ways as if there was a corporation, and that W. L. Wells individually and W. L. Wells Company were not the same.

On October 4, 1900, W. L. Wells wrote to John F. Love (R., p. 62) as follows:

"I am going to make a change in my present firm after this season, so do not want my arrangement with you and the Loray made known to them, hence in writing me about this please mark your letters personal."

A request with which John F. Love complied.

John F. Love, on cross-examination (R., p. 96), was asked:

"Q. How did you suppose that you and Mr. Wells were

going to keep this away from Mr. Butterworth and Mr. John T. Wells, if it was to be paid out of the firm's cotton as you say?

"A. We did not know how we were to arrange it, he left it entirely with me."

Thus the defendant conclusively recognized that the subscription of W. L. Wells was *personal*, and that the cotton it was *receiving belonged to W. L. Wells Co.*

We submit, therefore, that the errors in the proceeding in the Court of Appeals are manifest, and that this plaintiff is entitled to recover as the circuit court had adjudged.

This brief may have been unnecessarily extended, but the magnitude of the amount involved is, we trust, justification, and we will now conclude by briefly referring to some of the cases cited

(4.)

IN THE BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

On pages 60 and 61 of this brief it is insisted that the Federal court has no jurisdiction over a *de facto* corporation, but no cases are cited sustaining that proposition; and we, with all due respect, submit that none of the cases cited in the brief are controlling upon the facts presented by this record, and the principles of law relied on are, as a rule, merely abstract, so far as this case is concerned, and cannot be availed of by the respondent here.

Among other cases cited is Kaiser *vs.* Lawrence, 56 Ia., page 104, which, as we have already shown, involves simply an attempt to make the stockholders of a corporation illegally formed liable to the creditors of such corporation as copartners.

Reference is also made to Bigelow *vs.* Gregory, 73 Ill.,

127, cited in Kaiser *vs.* Lawrence, *supra*. In the latter case the supreme court of Illinois expressly held:

"That there is a manifest difference where a corporation is created by special charter, and there have been acts of user and where individuals seek to form themselves into a corporation under a general law. In the latter case it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. *And there would seem to be a distinction between a case where, in a suit between a corporation and a stockholder, or other individuals the plea of nul tiel corporation is set up to defeat a liability which he may have contracted with the other* (this is the case at bar—italics ours), and the case of a suit against individuals who claimed exemption from individual liability on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former."

Besides, the supreme court of Illinois in the cases already cited, and in much later cases to which we will now refer, have maintained the doctrine that a *de facto* corporation has a standing in court, and the defendant which has dealt with it as a corporation, and owes it as a corporation, is estopped to assail its corporate existence.

In Gunderson *et al. vs.* Illinois Trust and Savings Bank *et al.*, October 25, 1902, 65 N. E. Rep., 326, the supreme court of Illinois said:

"A corporation may be one *de facto* although not completely organized in accordance with the provisions of the statute. Bushnell *vs.* Machine Co. 138 Ill., 67. * * * But if an association is in the exercise and use of corporate franchises under color of legal organization, in pursuance of a general law, it is a corporation *de facto* as to third persons dealing with it and subject to the same liabilities as corporations regularly and legally organized."

In Lincoln Park Chapter No. 177, R. A. M., *vs.* Swatek *et al.*, October 26, 1903, 68 N. E. Rep., 429, the supreme court of Illinois said:

"The general rule is that one who deals with a corporation as existing *de facto* is estopped to deny, as against it, that it has been legally organized. Bushnell *vs.* Consolidated Ice Machine Co., 138 Ill., 67 * * * It is for the State alone to complain of any mis-user or non-user of the powers conferred in the creation of the corporation. Citing Coquard *vs.* Nat'l Linseed Oil Co., 171 Ill., 480."

In Bergeron *vs.* Hobbs, 96 Mo., 641; 65 Am. St. Rep., 85, the supreme court of Wisconsin simply enforced the laws of the State of Wisconsin holding "until articles of incorporation are filed in the office of the register of deeds of the county, there is no color of legal right to act as a corporation. The filing of such paper is a condition precedent to the right to so act."

The Revised Statutes of Wisconsin expressly prescribed:

"No corporation shall until such articles (of incorporation) be so filed for record have existence."

This case also presents the question of the liability of the stockholders of an illegal corporation to the creditors of that corporation, and not the right of a debtor of that corporation to defeat liability by reason of some defect in the organization.

Justice Marshall in that case filed a powerful dissenting opinion, reviewing quite a number of cases.

Wexelburg *vs.* Flower City Nat'l Bank, 64 Fed. Rep., 90, also involved the construction of said statute of Wisconsin, and also maintained that the signers of the articles "having failed to comply with the law, are liable for the debt contracted in the name of the corporation."

The later case of Gilliam *vs.* Druse, October 15, 1901, 87 N. W. Rep., 557, holds:

"Where the incorporators of a mutual insurance company who were business men unlearned in the law, employed an attorney to draw their incorporation articles, and they signed the articles in the body of the instrument, and not at the end as required, and did not acknowledge the same, though

they immediately organized and began transacting business, the corporation will be deemed to exist *de facto* and a member having dealt with it will be estopped from denying its corporate existence."

Fizer *vs.* Miss. & Tenn. R. R. Co., 32 Miss., 360, and Barrington *vs.* Miss. Cent. R. R., 32 Miss., 370, have, as will be readily perceived, no bearing upon the questions in issue.

We have already cited three cases decided by the supreme court of Mississippi, and they sustain the proposition for which we contend.

Lake Ontario, Auburn & N. Y. R. R. Co. *vs.* Mason, 16 N. Y., page 451, is not an authority for the appellee, and Burns *et al. vs.* Beck *et al.*, Sup. Ct. of Ga., 10 N. E. Rep., page 121, not only fails to support the contention of appellees, but is a direct authority for appellant.

Empire Mills *vs.* Alston Grocery Co. *et al.*, 12 L. R. A., 366, holds:

"The stockholders are liable as partners on contracts of a corporation which they have undertaken to form for a certain business, under the laws of another State, solely because a corporation for such business could not be legally organized in the State where it is to be carried on."

The court said, quoting from Morawetz on Corporations:

"To obtain a charter for the purpose of evading the laws of a foreign State, under cover of the rule of comity, would be a fraud upon the State granting the charter; and to attempt to act under such charter in the foreign State would be a fraud upon the latter."

This is a doctrine not involved in any manner in this record, and the citation is without relevancy.

Jones *vs.* Aspen Hardware Co., 29 L. R. A., 143, is also without application. The court held:

"Neither a *de jure* corporation nor a *de facto* corporation can exist where the articles are not filed in the office of the Secretary of State and the fee therefor paid as required by

Session Laws 1887, p. 406, *which expressly prohibits the exercise of any corporate powers until this is done.*" (Italics ours.)

The court enunciates the following principles:

"A *de facto* corporation can never be recognized in violation of a positive law. To recognize the defendant as a *de facto* corporation would, as we have stated, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power."

The court further said:

"One object of this statute is to restrict the organization of 'wild-cat' corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the over-capitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate powers, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act."

This, therefore, presents solely a question of public policy, which the courts will always enforce, and has no resemblance to the case at bar, and does not involve the doctrine of estoppel.

Maryland Tube and Iron Works *vs.* West End Imp. Co., 39 L. R. A., 810, also involved the construction of the laws of the State of Maryland. The court held:

"Lack of corporate existence of the plaintiff suing as a corporation can be set up to defeat the action of the defendant, when this is based on the failure of the plaintiff to pay the bonus tax proposed by Acts 1890, chap. 536, under which such non-payment prevents the attempted corporation from having or exercising any corporate powers."

The court further said:

"To hold that the corporation had a right to sue would strike with absolute nullity the plain and imperative lan.

guage of sec. 88 F, which declares that no such corporation shall have or exercise any corporation powers until such bonus is paid."

This, therefore, is another rule of public policy, and the court simply gave it effect in its construction of the statutes.

The Maryland case and the Colorado case, based on statutes which deny the corporation the right to *use any of its powers* (which, of course, is not the case here), are in harmony and maintain a rule expressly declared by the statute, and can have no reference, in our opinion, to a corporation which is created a corporation by the very first section of its charter, and simply failed to pay in the capital stock subscribed at the beginning of its business, under a statute where there is no penalty for violating the provisions of the statute, and no declaration that an act done in violation of the statute is illegal and void. Besides, the later case of Hammond *vs.* Strauss, 53 Maryland, page 1, already cited, is a direct authority for the petitioner.

The Entire Case Before the Court.

The writ of *certiorari* granted by the court in this case brings up the whole record, and the court has the power to dispose of the entire case—not only the question of jurisdiction, which was passed upon by the circuit court of appeals, but also the other questions involved.

This court "may require the whole record to be sent up for its consideration, and thereby decide the whole matter in controversy."

United States *vs.* Jahn, 155 U. S., 112–113.

"But while the court of appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ

of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

Panama R. R. Co. *vs.* McNair Shipping Co., 166 U. S., 280–284.

"The Supreme Court has power under act of March 13, 1891, to require any case pending in the circuit court of appeals regardless of status of case in that court to be certified to it."

Forsythe *vs.* Hammond, 166 U. S., 506–513.

We earnestly request that this honorable court exercise its discretion to dispose of the entire case, for we submit that the rights of the petitioner are plain, and through the delays of the law the petitioner has been for more than four years deprived of its money. The debt was due in 1900. The case was first tried in June, 1902, in the circuit court for the western district of North Carolina. It was argued before the circuit court of appeals in November, 1902, and after holding the case for a year that court ordered a reargument, and the case was again argued in November, 1903. The opinion was filed in the circuit court of appeals in February, 1904, and a few weeks thereafter it was brought to this court by writ of certiorari. We respectfully submit that this long delay should appeal most strongly to this honorable court and should cause it to exercise its discretion to hear and determine all the questions involved and thus make an end of the long-drawn-out controversy.

Assuming, then, that the court will hear the entire case, we will proceed to discuss the questions involved other than that of jurisdiction; and we desire, in the first place, to refer to

Judge Boyd's Opinion.

After hearing this case in the circuit court, Judge Boyd wrote an opinion, which will be found in the record, on page 184. After disposing of the question of jurisdiction, Judge Boyd discussed the respondent's defense to the merits, and he held that there was no evidence sufficient to go to the jury, and he directed a verdict in favor of the petitioner. The reasons which he gave for this course are cogent and, we submit, are unanswerable. The burden of proof was on the defendant to sustain its affirmative pleas of settlement and payment, and Judge Boyd ruled that defendant had not sustained its pleas by competent evidence sufficient reasonably to warrant the jury in finding for defendant. The judge who tried the case was in position to see the demeanor of the witnesses on the stand and to determine how far the jury was warranted in finding a verdict upon the testimony offered. If the main witness for the Wells Company, John T. Wells, was to be believed, then, apart from all the points of law in the case, the respondent had absolutely no ground upon which its defense could be sustained, even though every word which the witness for the respondent testified to was believed. Judge Boyd was likewise in position to observe the witness for the respondent, John F. Love, and he could determine how far the jury was warranted in giving credence to his vacillating and wholly unsatisfactory testimony.

This court has held too often to need citations that a Federal judge in presiding at the trial of a cause is there to see that substantial justice is done, and that a Federal appellate court should be slow to overrule the decision of the trial judge when he holds that the case is one in which the ends of justice require that he should direct a verdict.

An examination into the merits of this case will show conclusively the justice of Judge Boyd's decision.

Contentions of Defendant.

The court will observe that this is an action brought to recover a large sum of money alleged to be due by the respondent to the petitioner for cotton sold and delivered. The attention of the court is called to the fact that the respondent in its answer admits that the cotton was sold, as alleged in the complaint. At the beginning of the trial, when his honor Judge Boyd called on the parties to state their contentions (see bottom of page 15), the defendant's counsel admitted that the cotton had been received and that the charges for the same were correct, and the only pleas of the respondent were that the plaintiff was not a corporation, and that there had been paid upon this claim and upon the claim of the plaintiff against the Avon Mills the sum of fifty thousand dollars ($50,000), and the respondent admitted owing the balance to the petitioner, so that subject to the credit of fifty thousand dollars ($50,000) the respondent and the Avon Mills now admit owing the balance of the purchase-money, with interest on each invoice from thirty days after date of invoice, exactly as it is claimed in the complaint.

The answer of the respondent (R., pp. 7, 8) avers that at the time of the purchase of the cotton by the respondent W. L. Wells, who represented the petitioner in the sale, in order to secure the sale of said cotton to the defendant, agreed with the said John F. Love that if he, as agent of the defendant, would agree to purchase cotton from the said Wells or from the partnership or corporation represented by him a portion of the purchase-money due for the said cotton might be invested in the stock of another corporation about to be organized known as the Loray mills, and the defendant then alleges that pursuant to said agreement it had three settlements with the petitioner, one on August 3, 1900, and a second settlement on December 3, 1900, and lastly in January, 1901.

Attention is here called to the fact that the answer of the defendant (R., pp. 8–9) distinctly alleges that the agreement between W. L. Wells and John Love was that—

"a portion of the purchase-money due for said cotton might be invested in the stock of the said proposed manufacturing plant which was known as the Loray mills."

The only interpretation that can be put upon this language is that the defendant was here alleging that the Wells Company had agreed to have the money due for the cotton invested in stock of another corporation, and that this stock was to belong to the Wells Company. The defendant further alleges that afterwards settlements were made "in *strict* accordance with the terms of the contract." We find, however, that upon the trial the defendant wholly abandoned any effort to show that the Wells Company had agreed that the money due for its cotton might be invested in stock of the Loray mills, and the defense was shifted into an effort to show that the company had ratified an act whereby the purchase-money of cotton was diverted into the payment of an individual subscription, to the amount of fifty thousand dollars ($50,000), made by W. L. Wells for his own benefit.

It developed on the trial that these alleged settlements were not settlements at all, and the most that could be made out of it for the respondent was that there was an attempt on the part of John F. Love, who was treasurer of the respondent, and also of the Avon mills, and who was chief promoter of the Loray mills, to apply the purchase-money of cotton bought from the petitioner towards a subscription made by W. L. Wells to the Loray mills. We will later on discuss these alleged settlements of August 3 and December 3, 1900, and will merely now call the attention of the court to the fact that as to the alleged settlement made in January, 1901, the witness Love distinctly admitted that there was no such settlement and no foundation for this allegation in the answer which was sworn to by him (R., p. 97).

It was contended by the respondent that John F. Love had made certain entries on his books, and upon these respondent relied, in large measure, to show the alleged payments contended for; but it will develop upon an examination of the testimony that these entries upon the books by John F. Love were a sham and a subterfuge, and made merely to enable him to "assist the Loray mills" (R., p. 81), which organization had a struggle for its existence from the very start, and Love was diverting all the funds in his reach to endeavor to save it from financial ruin—a thing which he failed to accomplish, as it went into insolvency at its very first meeting (R., pp. 153–170).

Contentions of Petitioner.

The main contentions of the petitioner in the case are as follows:

(1.) That the vague, indefinite, and wholly unsatisfactory testimony of John F. Love as to an equally vague and indefinite agreement on the part of W. L. Wells to apply a portion of the purchase-money of cotton in payment of stock of the Loray mills is directly contradicted by the letters which were written after the alleged conversations and which constitute the only written agreement between the parties, and which are therefore the only binding agreement in reference thereto. Upon the strength of these letters and other evidence, we contend that no such agreement was ever entered into by W. L. Wells, even if he had authority to bind the petitioner by any such contract.

(2.) But it is apparent from all the evidence that W. L. Wells had no authority to bind the petitioner by any such contract. It is not contended that he had any such actual or express authority, and it is plain that he had no implied authority from the petitioner to accept anything but money

in payment of cotton. No one could presume that he had any such authority, because it was not only extraordinary and out of the usual course of business, but was *ultra vires* of the petitioner.

(3.) Even if W. L. Wells made such an agreement, yet it is apparent that it was only made for his own individual benefit, and it could not be presumed that he was authorized to have the money of his principal applied in payment of his own individual stock subscription to the Loray mills.

(4.) There has been no ratification of any agreement made by W. L. Wells, because (*a*) there are no facts from which ratification could be inferred; (*b*) the Wells Company did not have knowledge necessary to constitute ratification; (*c*) the contract could only have been ratified by the party who had authority to make it; (*d*) bringing suit on the contract was not a ratification, because none of the cotton in controversy was sold under the terms of the contract set up by respondent, and, besides, it was impossible for the Wells Company to repudiate the contract and save itself harmless; (*e*) the contract was *ultra vires* of plaintiff corporation, and therefore incapable of ratification.

The foregoing are the principal contentions made by the petitioner and will be discussed at length in that part of the brief which follows.

How Case Was Tried in Circuit Court.

In order to enable the court to get a clear idea of the merits of the case we desire to show how the case was tried in the circuit court.

The petitioner, who is plaintiff in the action, after introducing its charter, put upon the witness stand J. T. Wells (R., p. 16), who testified as to the various sales of cotton and the

payments made, and testified that the balance was due exactly as alleged in the complaint. He denied absolutely all knowledge of any agreement made by W. L. Wells as to the application of the purchase-money to the payment of stock of the Loray mills. He was the treasurer of the petitioner and was the officer in charge of its affairs at the home office. This testimony of John T. Wells, together with admissions of respondent, made out the case, and the respondent then placed upon the witness stand John F. Love (R., p. 65), who was the secretary and treasurer and general manager of the respondent, and also of the Avon mills. The respondent undertook to show by Love the agreement between him and W. L. Wells and other transactions and letters which passed between the parties, which, according to respondent's contention, tended to support the pleas set up in the answer.

By reference to pages 111 and 112 of the Record it will appear that when the evidence was offered by respondent as to transactions between John F. Love and W. L. Wells in reference to the subscription to the stock of the Loray mills and the alleged agreement to allow the purchase-money of cotton to be applied in payment of the same, the petitioner objected to all this evidence, and his honor stated that he would admit the same *subject to the requirement that it should thereafter be shown in the course of the trial that W. L. Wells had authority from the petitioner to make the agreement, or that the same had been ratified by the petitioner.*

At the close of the testimony offered by respondent the petitioner stated (p. 112) that before introducing testimony in reply the petitioner would move the court that all the evidence which had been offered as to transactions between W. L. Wells and John F. Love in regard to the agreement, that part of the purchase-money of the cotton should be applied to the payment of the alleged subscription made by W. L. Wells to the stock of the Loray mills, be stricken out, for that the evidence of the respondent had closed and the respondent had failed to show any authority on the part of

W. L. Wells to agree that any part of the purchase-money should be applied to the payment of his subscription to stock in the Loray mills, and had failed to show any ratification of the same by the petitioner.

His honor thereupon stated that he would instruct the jury that the respondent had failed to offer any evidence from which the jury would be warranted in finding that W. L. Wells had authority to bind the petitioner by any agreement to apply any part of the purchase-money to the payment of his stock, and had failed to offer any evidence from which the jury would be warranted in finding that the petitioner had ratified any such act, and that upon the pleadings and the evidence in the case he would instruct the jury to find the issue in favor of the petitioner and render a verdict for the amount claimed in the complaint.

These statements will be verified by reference to page 112 of the Record, and we call attention to them for the reason that it is argued by the respondent that the failure on the part of the petitioner to put W. L. Wells and George Butterworth upon the witness stand was a circumstance from which the jury would be warranted to infer that they knew something which would support the contentions of the respondent. It is plain that the petitioner could not have put these witnesses upon the stand to reply to the testimony of respondent after Judge Boyd had ruled that respondent had not made out its pleas and that there was nothing to go to the jury. Therefore absolutely no inference prejudicial to the petitioner can be drawn from the fact that these witnesses were not put upon the witness stand.

Statement of Material Facts.

Having shown the court the contentions of the parties and also how the case was tried, we now desire to give a statement of the material facts in consecutive order:

The W. L. Wells Company, the petitioner, did business

with The Gastonia Cotton Manufacturing Company, the respondent, and with the Avon mills for three cotton seasons, beginning in the fall of 1898, and it may be noted here that a cotton season runs from the first of September of one year to April of the succeeding year (top of page 17).

W. L. Wells subscribed for five thousand dollars ($5,000) of the capital stock of the petitioner, and John T. Wells and George Butterworth for twenty-five hundred dollars ($2,500) each. John T. Wells was the treasurer and office man, while George Butterworth, the vice-president, bought cotton for the corporation, and W. L. Wells, the president, sold most of the cotton, though Butterworth sold cotton also (p. 38).

John F. Love was the treasurer and general manager, both of the respondent and also of the Avon mills, and he was the chief promoter of the new enterprise known as the Loray mills. He also owned a bank known as the Gastonia Banking Company. Upon the books of this bank were some very remarkable entries connected with these transactions which will be referred to later.

There was no dispute as to the dealings between the parties for the first season, 1898–1899, and all the cotton purchased by the respondent was paid for at the close of the season.

Cotton Season, 1899–1900.

In the fall of 1899 W. L. Wells visited Gastonia, and, according to Love's testimony (p. 66), Wells agreed to take ten thousand dollars ($10,000) of stock in the Loray mills, and stated that he might move to Charlotte, and, if so, would take fifty thousand dollars ($50,000) of stock, and in that event he was to be cotton-buyer for the Loray mills and for the respondent and the Avon mills, and he was to become vice-president of the Loray mills. That Love did not rely upon this as a subscription to the stock of the Loray mills is shown by his testimony on page 67 to the effect that Wells visited Gastonia on the 10th of May, 1900, when he agreed to take

stock, but "had not decided as to the amount." In fact, there seems to have been nothing definite reached until the letter written by W. L. Wells to Love on July 13, 1900 (p. 58), and in this letter Wells agreed to take ten thousand dollars ($10,000) of stock, with the possibility of increasing to twenty-five thousand dollars $25,000). Instead, however, of agreeing that Love might pay Wells' subscription out of the money due for cotton, Wells distinctly states in this very letter: "If you can possibly do so *please remit us balance on account, as we need it to settle up matters* which I should like to do before leaving next Wednesday." Here, then, is the evidence in writing both as to the subscription to the stock of the Loray mills and also upon the very question at issue in the case—that is, as to the right to apply the cotton money to the stock subscription. No one can doubt that if it had been Wells' understanding that the subscription to the Loray mills might be paid out of the purchase-money of cotton, he would in this letter have instructed Love to deduct the ten thousand dollars ($10,000).

That there was something said about using the money due for cotton in payment of stock subscription, and that Wells had *not* agreed to this, is apparent from the letter written by Wells to Love on May 18, 1900, a few days after his return from Gastonia to Vicksburg, in which he says (p. 122):

> "*Regarding the balance due us on last season's purchases I had rather not mix that up with anything else and would thank you to remit to cover this as soon as possible as it would facilitate me very much.*"

Here is as distinct a refusal as language could make it to permit the purchase-money of the cotton to be applied in payment of the stock subscription, and a distinct demand to have the entire amount remitted.

Indeed, it is worthy of note that during Love's testimony he gave the most unsatisfactory statement as to the alleged

agreement on the part of W. L. Wells, and by turning to page 67 of the Record the court will see how Love's counsel had to drag out of him, so to speak, the testimony in regard to the alleged agreement. Nowhere in the record can there be found any clear, explicit, and satisfactory statement on the part of Love as to exactly what was agreed to by Wells and as to the time and place when the agreement was made.

It will appear, therefore, that prior to the first day of August, 1900, Love had received numerous demands for the payment of the account in full, and particularly had received the letter of May 18, 1900 (p. 122), distinctly declining to have the accounts "mixed up" and requesting remittance in full, yet in the face of all this Love pretends that on July 31, 1900, he entered to the credit of the Loray mills on the books of the Gastonia Banking Company the sum of ten thousand dollars ($10,000) received from W. L. Wells (p. 140). It must be noted that this entry was made on the 31st of July and not on August 3, 1900, and yet this is the "settlement" which he refers to in his answer as having taken place on August 3, 1900 (p. 8), all of which goes to show the utter unreliability of his statements.

Love admits that he gave the Wells Company no notice of this entry on his books. About this time he sent a remittance which was sufficient to have paid all that was then due except ten thousand dollars ($10,000) and except also the interest which had not been paid on past-due invoices. It will be noted at the bottom of page 67 that the remittance which he did make was thirty-two hundred eighty-three and $\frac{13}{100}$ dollars ($3,283.13), covering invoices for sixty-four bales of cotton, and on the top of page 68 he testified that he got this invoice returned with the endorsement, "Paid August 3rd, 1900." The attention of the court is called to the fact that according to Love's own admissions he did not have a single statement of account from the Wells Company receipted in full, because he always remitted by invoices and had specific invoices marked paid (top of page 86).

It is not denied then but that during the entire month of August the Wells Company was in absolute ignorance of the fact that Love had attempted to transfer ten thousand dollars ($10,000) of its money in payment of W. L. Wells' subscription (bottom of page 88). The respondent contends, however, that notice was given to the Wells Company by the endorsement made by John F. Love on the letter written by the Wells Company on the 31st of August, 1900. This letter is found on pages 59 and 60, and the letter, together with the endorsement by John F. Love, is here produced in full:

"VICKSBURG, MISS., *August* 31, 1900.

"Mr. JOHN F. LOVE,
"*Treasurer, Gastonia, N. C.*

"DEAR SIR: Enclosed we beg to hand you a statement of your account to September 1st, showing balance due us of $12,691.67. May we ask that you remit us by return mail in full for this balance, and oblige,

"Yours very truly, W. L. WELLS CO."

(Endorsement by John F. Love.)

"$10,000.00 stock Loray mills.
" 2,691.67 interest.

"$12,691.67 balance.

"We want to see your Mr. W. L. Wells about it when he comes to see us.

"Yours, JOHN F. LOVE, *Treas.*"

EXHIBIT "D."

This letter with the endorsement made by John F. Love was returned to the Wells Company, and it is this fact that respondent relies upon more than anything else in this whole case to support its plea that the Wells Company ratified the act of Love in appropriating ten thousand dollars ($10,000) of its money to the payment of the subscription of

W. L. Wells. We wish, therefore, to put the court in possession of the material facts bearing upon this letter and the endorsement made by Love.

In the first place it will be noted that the letter with the endorsement made by John F. Love was returned to Vicksburg in the absence of W. L. Wells, who was expected in Gastonia about that time (p. 31). W. L. Wells did reach Gastonia in September, 1900, and Love admits that he said nothing whatever to W. L. Wells about this ten-thousand-dollar ($10,000) payment (p. 89).

The most important fact in regard to this letter is the testimony of John Wells, who swore positively that he took absolutely no notice of this endorsement of John Love, and that the document was filed away among the records of the Wells Company by a young man in the office (p. 31), and more particularly he testified positively (top of page 35) that he did not know what John Love's endorsement on this letter meant, and that he had never heard of any subscription to stock of the Loray mills and did not talk with W. L. Wells about the matter. If this testimony was to be believed by the jury, then the whole force of the respondent's contention fell to the ground, because it completely negatived the inference which respondent was seeking to draw, viz., that the Wells Company had accepted the payment and ratified the act of John Love in transferring ten thousand dollars ($10,000) of its money in payment of stock.

This testimony of John T. Wells therefore proves conclusively that he knew nothing about this appropriation of the company's money, and it also proves that George Butterworth, who was vice-president of the company and a member of the board of directors and whose affirmative assent to the proposition was absolutely necessary, was in Yazoo, Mississippi (bottom of page 35). Even if Love had sent a statement showing clearly and unmistakably that he had appropriated ten thousand dollars ($10,000) of the company's money to the payment of W. L. Wells' subscription, yet be-

fore this act of Love could have had any effect it would have been necessary that it be ratified by all of the members of the corporation, while here it is shown beyond question that two of the members, John T. Wells and George Butterworth, who were treasurer and vice-president respectively and both members of the board of directors, did not assent to it.

But referring again to the endorsement itself it will be noted by the court that it could not be construed into notice that Love had already applied $10,000 to the stock subscription, and the most that could be made out of it was that John Love wished to see W. L. Wells about "it" when he reached Gastonia. Love pretended when on the witness stand that the "it" which he wished to see about was the interest (p. 18); but he admitted that when W. L. Wells did go to Gastonia he did not speak to him about the interest (top of page 89), and, in fact, there never was any dispute about the interest account. This will appear by reference to pages 20 and 77, and more particularly by reference to the admissions in the answer and the admissions of counsel found at top of page 16. The complaint set forth that interest was due on all invoices after thirty days from date, and this was admitted to be true. Love telegraphed the Wells Company on September 12 (p. 125) that he was anxious to see W. L. Wells and arrange "business matters."

From all these circumstances it not only appears that the Wells Company did not understand by this endorsement made by Love on the letter of August 31 that he was claiming the credit of $10,000, but the facts and circumstances also show that John Love himself did not understand that he was claiming this as a credit, but merely that he was expressing a desire to talk to W. L. Wells about "it." As showing conclusively that Love did not consider that the $10,000 credit had been allowed in consequence of the endorsement on this letter of August 31, it is only necessary at this point to refer to Love's letter of February 2,

1901 (p. 62), in which he requests W. L. Wells to have the account of the mills *credited at that date with the* $50,000. *It is too plain for argument that if Love had supposed that the Wells Company had allowed the credit in August*, 1900, *of* $10,000 *he would have asked in the letter of February* 2, 1901, *that the account be credited with* $40,000 *instead of* $50,000.

The respondent's sole reliance in regard to this ten-thousand-dollar ($10,000) credit is that after the letter of August 31, with the endorsement of John F. Love upon it, went back to the Wells Company this company never made any specific demand for the balance due for the season 1899–1900. In reference to this it must be said that the Wells Company had exhausted itself in dunning Love prior to that time and a new season was just opening up, and John Wells testified that he left the balance due on the books for the season 1899–1900 and opened up a new account for the coming season of 1900–1901 (p. 35). The respondent got in debt during the fall of 1900, and frequent demands were made for money from that time on during the fall and winter of 1900 (p. 130), and payments were being made (p. 133), and it certainly could make no difference that a specific demand was not made for the amount due on August 31, 1900.

But again it will be noted that the whole amount of the balance claimed in the letter of August 31, 1900, was twelve thousand six hundred ninety-one and $\frac{67}{100}$ dollars ($12,691.67). By tracing this balance back through the accounts which appear in the record it will be found that twenty-six hundred ninety-one and $\frac{67}{100}$ dollars ($2,691.67) was interest. We have already shown that there never was any dispute about the interest account, and the attorneys admitted (pp. 15–16) that the interest was due exactly as it was claimed in the complaint, and it was there claimed to be due thirty days after date of each invoice. It must be conceded, then, that at the time Love wrote this endorsement upon the letter of the 31st of August, upon which so much stress is now laid, he knew that the interest amounting to

this large sum was still due, and this interest has never been paid up to this present time. Failure to demand this interest certainly does not show that it is not due, and by the same token a failure to demand the entire sum, including the interest, is no evidence that the Wells Company did not continue to claim the full amount. But apart from all this, as we have already shown, the failure to demand payment was only a circumstance from which unexplained the jury might have inferred that the Wells Company had allowed the credit of ten thousand dollars, but no judge could have permitted the jury to draw such an inference in the face of the full and clear explanation made by John T. Wells, who testified positively that no such credit was allowed and that the company never had treated this endorsement made by John F. Love on the letter of August 31, 1900, as a claim of a credit to the amount of ten thousand dollars.

As throwing further light upon the alleged settlement of August 3, 1900, and as showing conclusively that W. L. Wells himself knew nothing about any such appropriation of the company's money to the payment of any subscription which he had made, we find that in the letter of October 4, 1900, W. L. Wells wrote to Love making the fifty-thousand-dollar ($50,000) subscription, thereby clearly indicating that he understood that the subscription had been left open, and that nothing at all had been done in regard to it; but in this letter he tells Love that he wants the payment of his entire subscription of fifty thousand dollars ($50,000) "to come in on the last payment." No reasonable person can read this letter without reaching the conclusion that W. L. Wells knew absolutely nothing of Love's prior attempt to appropriate ten thousand dollars of Wells Company's money to the payment of any prior stock subscription.

COTTON SEASON 1900–1901.

We have endeavored in the foregoing part of this brief to place before the court in consecutive order a statement of the most material facts bearing upon the transactions connected with the season of 1899–1900, and more particularly the facts bearing upon the alleged settlement made in August, 1900. We now wish to call attention to the main facts connected with the season of 1900–1901 as bearing particularly upon the alleged settlement of December, 1900.

In September, 1900, W. L. Wells visited Gastonia on his way from Canada (p. 68), and the subject of the subscription to the stock of the Loray mills was still undecided. Love was urging Wells to come to some final decision, and hence, after the return of Wells to his home in Vicksburg, he wrote the letter of October 4, 1900 (p. 62), which is here copied in full:

"VICKSBURG, MISS., *October* 4, 1900.

"Mr. JOHN F. LOVE, *Gastonia.*

"DEAR MR. LOVE: In reference to the Loray matter, I have arranged to take the $50,000.00 stock, but want you, as stated when there, to let this come in on the last payment, say about 1st January next. This will enable me to clean up my deal I wrote you about last spring, and besides for the next 90 S/s, I will be crowded somewhat for money to carry on my business. I am going to make a change in my present firm after this season, so don't want my arrangements with you and the Loray known to them, hence in writing me about this please mark your letters '*Personal.*'

"Please keep me posted about how the Loray is progressing.

"With regards to Mr. Gray, I am,

"Yours truly,

W. L. WELLS.

"P. S.—When is your idea to organize?"

In regard to this letter, it will be noted, in the first place, as already stated, that W. L. Wells certainly had no idea

that any of his company's money had already been used in paying his stock subscription, and he is evidently making what he conceives to be a subscription which covers the entire amount he was to take of this stock, and he is making request that "this come in on last payment," showing that he knew of no prior payment and was making his own arrangements to pay the entire $50,000 out of his own funds. But the most important thing in connection with this letter is that Wells stated that he did not want his arrangements known to his associates in business, and asked that all letters in regard to the Loray stock be marked "*Personal.*" John Love testified that he complied with this request, and that after that date all letters about the Loray mills were marked "Personal" (top of page 91), and John T. Wells also testified that all these letters came to the office marked "Personal," and that he did not open them, nor did he know anything of their contents, and particularly that he did not know anything about this letter of October 4 (p. 35).

Love pretended in his testimony to understand that part of this letter which said "let this come in on the last payment, say about 1st of January next," to mean the last payment on the cotton, but a moment's reflection will disclose the absurdity of this claim. There were no last payments on the cotton, and in point of fact there were only two invoices, as shown on page 5 of the Record, which became due after the 1st of January, so that if Love's contention was correct he would only have been authorized to take out the two invoices that were due about the 1st of January and which amounted to only about $6,500; and yet we find that he did not wait until the 1st of January, but pretended that he took the whole amount out on the 3d of December. What Wells plainly meant was that he desired his payment to come in on the last payments of the stock. Love had told him that the stock was to be paid in installments of 10 per cent. per month, and under that arrangement the last payment on the stock would have been due about the 1st of January, 1900.

It is now contended by Love that on the occasion of the visit of W. L. Wells to him in September, 1900, there was some sort of an arrangement which Love understood to be an agreement that the money due for cotton should be applied to the stock subscription of W. L. Wells; but, as directly contradicting this testimony of Love, we find a letter written by W. L. Wells to Love on October 5, 1900 (p. 126), in which Wells says, "*By the way, when there we failed to talk anything about how you wanted to pay for this season's purchases.*" Nothing could be more explicit than this as a contradiction of Love's testimony to the effect that Wells had agreed that the season's purchases should be paid for by a stock subscription to the Loray mills.

On page 127 is found Love's reply to Wells' letter of October 5, and in this letter Love says, "As to payments on cotton we wish to remit you promptly for our immediate wants and we are making arrangements with National Surety Company to get the money when we commence storing cotton." Here is a distinct written agreement that Love would "*remit*" for the cotton purchased, and if there ever had been any verbal agreement to the contrary this letter would have annulled it.

On page 130 is found a letter which Wells wrote Love under date of October 31, 1900, notifying him of shipment of one hundred and fifty bales of cotton and saying, "I suppose you will want us to carry this cotton until it arrives when you will reimburse us through your arrangements with the National Surety Company. Please let us know definitely about this that we may know just what to say to our bank about it." To this letter Love replied, on November 3, 1900 (p. 130): "We are arranging with the National Surety Company to get all the money you want and as you suggest you can arrange with your bank accordingly."

It may be here noted that Wells did arrange with his bank and secured large credit from the bank on the faith of Love's statement, and there is at this very time due to the

bank more than twenty-seven thousand dollars ($27,000), not including interest (p. 37), and if the plea of the defendant is sustained in this case there will not be sufficient assets of the company out of which to pay the bank the debt contracted on the faith of Love's statement.

On November 13, 1900, Wells Company wrote Love (p. 132): "Hope you have perfected your arrangements with the National Company and will be able to *remit us promptly as the cotton is received*, as it runs into money at a terrible rate and it does not take long to get in very bad shape with our bank." To this Love replied, on November 17, 1900 (p. 132): "On money matters we have perfected our arrangements and we were looking for a check today but it has failed to come and we expect it now the first of the week when we will make you a remittance."

We earnestly submit that no one can read this correspondence when taken in connection with the unsatisfactory testimony of John F. Love and reach any other conclusion but that there had been between him and W. L. Wells absolutely no agreement or arrangement by which the company's money was to be applied in payment of W. L. Wells' stock subscription. The affairs of John Love were at this time getting in desperate shape, and particularly the affairs of the Loray mills. He was going ahead attempting to build this million-dollar plant without ever having had any organization whatever of the Loray Mills corporation, and he was in desperate need of funds to carry on this stupendous enterprise. He pretends, therefore, to have gone to his books and made additional entries, which will be found on pages 140 and 141. He first put down that the W. L. Wells Company had deposited in the Gastonia Banking Company $40,688.08, and then he entered that the Loray mills had deposited with the Gastonia Banking Company $10,000, which it had received from W. L. Wells individually. This made it appear on the books of the Avon and Gastonia mills that their accounts with W. L. Wells Company were square (bottom of page 92),

and it enabled Love to use these funds to "assist Loray" (top of page 97).

These book entries of December 3, 1900, constitute the main settlement which is set up in the answer of the defendant. It is admitted by Love that he gave the Wells Company no notice whatever of this appropriation of the company's money (p. 94), and yet this is called a settlement!

According to Love's contention there was nothing due from his mills to the Wells Company after this so-called settlement of December 3, and yet we find that on December 18, 1900, the Wells Company wrote Love a letter, sending invoices, and saying (p. 134), "We presume our recent shipments are in, and if so please remit as soon as possible as we stand very much in need of same." To this letter Love made no reply, as he undoubtedly would have done if he had supposed for a moment that the accounts were settled on his books.

Again, on January 2, the Wells Company wrote him (p. 37):

"By the way, what about paying for some cotton? Certainly most if not all of our shipments since the middle of November have arrived and we see no reason why we should not be paid according to the understanding. We don't call to mind an instance in our experience where we have worked harder to secure a lot of cotton than we did in these purchases for you and of course we feel that *we are entitled to as prompt a reimbursement as it is possible for you to make.*"

Now, it would seem that if there was a scintilla of good faith in Love's contention he would have replied to this urgent letter and he would have given the Wells Company a "*reason*" why he had not remitted and would have stated that he did not owe them, and that the reason why he had not remitted was that forty thousand dollars ($40,000) of the money had been turned over to the Loray mills in accordance with an understanding that he had had with W. L.

Wells. He admits, however, that he made no reply to this letter.

Following this, we find that on January 7 the Wells Company wired Love (p. 118): "When can we expect a remittance? We are disappointed at not receiving a remittance last week." Again, on January 10, the Wells Company wired him: "Have received no reply to our telegram of the 7th inst. Please give it attention. Reply by wire so that message will reach us tomorrow. It is important for us to know exactly what we can depend upon. Particulars by mail." On same day the company wrote him (p. 119), urging him to remit, etc. To all of these Love made no reply. It is apparent that it had never occurred to him to contend that the book entries which he made on the 3d of December amounted to a settlement. He knew that the company had not authorized it, and he did not have the boldness to say anything about it. The company dunned him again by wire on January 31, 1901 (p. 138). His paltry explanation of all this will be found on page 95 of the Record and is but in line with all the balance of his testimony. It seems to have occurred to him at this juncture for the first time to request of W. L. Wells that he would have the house credit the account with the $50,000, and then for the first time he gave notice to W. L. Wells himself of his having paid in the $50,000, and he seems to have determined to make the effort to have W. L. Wells arrange it with his house in some way so that the money which he had appropriated to the use of the Loray mills might stand. It will be noted in this letter which we are about to refer to and upon which respondent relies so much that Love does not tell Wells that he had already balanced the account on his books by appropriating $10,000 on the 3d of August, 1900, and $40,000 on the 3d of December, 1900, but he is making the request of Wells that he would have his house then—that is, upon receipt of that letter—credit the mills with the full sum of $50,000.

This brings us to the letter of Love to Wells under date of February 2, 1901 (p. 62), in which Love, after mentioning matters in connection with the building of the Loray mills, says:

"I have paid in your fifty thousand dollars ($50,000) and can send you certificate at any time in any way you suggest and before issuing them will await your advice. Please have our account with your house credited with the amount."

This letter, according to the testimony of John T. Wells (p. 35), came marked "Personal," and he never knew anything of its contents. Love also testified that he marked the letter "Personal." He says (top of page 91), "I think all letters after October 1st, 1900, were marked 'Personal.'" We have it fixed, then, by all the testimony that this letter upon which the defendant now relies so much, and which it contends gave the Wells Company full notice necessary to constitute ratification, was marked "Personal" for the express purpose of keeping the Wells Company from finding out anything about it.

At this point we wish to explain certain testimony of John T. Wells, which, if taken by itself and unexplained, might produce an erroneous impression. On page 25 it will be found that on cross-examination counsel for the defendant, referring to a check which had been sent by Love to the Wells Company, asked the witness if the check did not pay all the invoices that were then due and some that were not due, and to this the witness replied that it paid all invoices of the Gastonia Manufacturing Company up to and including November 5, 1900, and all of the Avon mills up to and including November 2, 1900. From this testimony it has been argued that John T. Wells admitted that the books had been balanced, but by reference to page 24 it will be seen that counsel were cross-examining John T. Wells in regard to specific invoices, and finally asked the question

whether the specific invoices referred to by counsel did not when added up amount to $40,357.59. A check for $25,000 had already been sent and Love inclosed a check for $15,357.59, and these two remittances together made $40,357.59 and covered *specific invoices, and it was specific invoices which were marked paid.* Love admitted that he did not have a single account or statement from the Wells Company which was marked paid in full (top of page 86).

But the respondent relies upon the fact that after the letter of February 2, 1901, went to the Wells Company there were no more demands until August, 1901. The most that can be made of this is that the silence of the company might unexplained have afforded an inference that the company knew something about the matter if it had not been affirmatively shown that the company knew nothing about this letter. The failure to continue "dunning" Love was fully explained by John T. Wells, who testified in the first place that he never knew anything about the letter of February 2, 1901 (p. 35), and he further testified that he asked W. L. Wells several times about the account, and W. L. Wells stated that Love was "hard up" and asked to let the matter stand (bottom of page 36). If this testimony of John T. Wells was to be believed (and Judge Boyd seems to have thought it worthy of credence), then no jury should have been permitted to find that the company did know about the letter of February 2, 1901, and had assented to the diversion of its funds to the payment of the stock subscription.

Moreover, it appeared from the testimony (p. 36) that these mills had owed the Wells Company large amounts before and the Wells Company had exhausted itself in "dunning" Love's mills. It is now admitted that a large sum—to wit, over $12,000—was due all during the spring of 1901, and if no demand was made for the payment of the sum which Love admits now was due, then it is difficult to see how a failure to make demand could be used as an argument against the Wells Company; and, finally, when demand

was made in August, 1901 (p. 57), there was no attempt on the part of Love to claim that $50,000 had already been paid, and this he never did until a short time before this action was brought and the attorney for the Wells Company was threatening him with suit (p. 101).

Love's Fictitious Book Entries.

The respondent in this case relies very greatly upon the entries which Love testified that he made on his books by which on the 3d of August, 1900, and on the 3d of December, 1900, he entered debits against the Wells Company of $10,000 and $40,000, respectively, both of them having been made without the knowledge or consent of the Wells Company. In order to show the hollowness of this claim it is only necessary to advert to Love's methods of business. An examination into these methods will show that he was in the most desperate financial straits and these entries were made for the purpose of having his condition show up better on the books of the various enterprises which he managed. The record will disclose that, although Love was being dunned for the money after the alleged book entries were made, yet he never at any time notified the Wells Company that he had made such entries or claimed such credits. We have already alluded to the fact that not until a few days before this action was commenced, in October, 1901, did Love ever even suggest the right to apply the purchase-money of the cotton to the stock subscriptions, and this suggestion was made to the attorney of the Wells Company when he threatened suit, and the only explanation that Love could make of it was that, although that was the first time he had mentioned the matter, yet *he had it in his mind all the time!* (p. 101).

As throwing light upon the situation, let us examine into Love's financial condition. He had in the fall of 1899 projected a stupendous enterprise, viz., the building of a

million-dollar mill. He bought the land and began the erection of it several months before he had even obtained the charter. The Loray was chartered on February 19, 1900, but was not organized until July 8, 1901, one year and nearly five months after it was chartered, and as soon as it was organized it went into liquidation as insolvent.

The first meeting of the stockholders of the Loray was held July 8, 1901 (p. 142). On July 11, 1901, three days after the first meeting, the directors passed a resolution (p. 153) to the effect that it was best to dissolve the corporation. The reason of this action of the board is disclosed by the report of the officers (p. 156) made to the stockholders, setting forth what they term the "crisis in the affairs of the company." This report shows the company's utter insolvency, and at the meeting of the stockholders on August 12, 1901, a resolution was passed (pp. 168 and 169) declaring "that the affairs of the corporation are in such condition, as appears by the report of the president and treasurer, *that a dissolution thereof seems necessary.*" Prior to this time Love had been managing alone the affairs of the Loray mills *without any authority from any one*, and its ruinous financial condition was due solely to his bad management.

The point we wish to emphasize is that Love had undertaken this stupendous enterprise without any adequate capital, and all during the erection of the mill before the organization of the corporation he was desperately pressed for funds. He was proposing to use the money which the sheriff of the county deposited in his bank from taxes, and also the proceeds of sale of town bonds which he admitted did not belong to him (pp. 75 and 118). This desperate financial condition furnished the motive for his most extraordinary juggling with all the assets that came within his reach.

As early as December 18, 1899, we find Love (p. 76) taking $13,000 which the Ozark mills owed the Wells Company and putting it in the bank, of which he was the exclusive

owner, and holding it until February 7, 1901, although the Wells Company was calling for the money.

But that was a small matter compared with his subsequent acts. In March, 1900 (p. 77), he transferred, without any authority whatever and without the knowledge of the Wells Company, all of the funds, amounting to $26,000, due Wells Company by the Gastonia mills, and placed it to the credit of W. L. Wells Company in his bank, and thus balanced the account of the Gastonia mills with the Wells Company, so that it was made to appear on the books that the Gastonia mills had paid the Wells Company all it owed.

On page 78 he testified:

"I charged them with $26,000 and closed their account and transferred the difference to the books of the Gastonia Banking Company."

He testified (p. 89) that he did precisely the same thing with the funds that the Avon mills owed the Wells Company, so that in March, 1900, he was holding the enormous sum of $51,637.34 (p. 80) which these two mills owed the Wells Company. This amount had been passed to the credit of the Wells Company on the books of Love's bank without the knowledge or consent of the Wells Company, and was held for several months, although the Wells Company was calling for what was due them.

On pages 78 and 81 of the Record will be found his paltry attempt to explain his conduct. He claimed that he did it "for convenience," and that he was awaiting Love's decision as to the stock. But that this contention was an afterthought is shown by the fact that when he received Wells' letter of May 18, 1900 (pp. 21–22), asking him not to "mix up" this account with anything else, but to remit it at once, Love continued to hold a large part of these funds, and, notwithstanding the letter of June 4, 1900 (p. 122), demanding that he remit and referring to his agreement to remit promptly, Love continued to hold a large part of the funds.

On June 19, 1900, Love wrote (p. 123) making a remittance, and stating that money was *scarce*, and that he would remit more soon "*if I am not too short.*" When he wrote this letter, on June 19, the accounts of the Avon and Gastonia had been balanced on his books for several months, and the funds had been put in his bank to the credit of the Wells Company. Finally, when Wells, on July 13, 1900, wrote (p. 57) agreeing to take the $10,000 and calling on Love to pay the balance he owed, he still held the funds.

But let us go further. In December, 1900, he again transferred funds amounting to $40,000 to the credit of the Wells Company in his bank, although he says the accounts were not due. Why did he do this? He explains it himself. On the bottom of page 92 he admitted that these entries on the books showed the stockholders of the mills that the accounts with Wells' Company had been paid. This money he admitted (p. 81) he kept in his bank to use. But more significant than all is his statement on page 97 that "the Avon and Gastonia mills anticipated payments *in order to assist the Loray mills*," and that he had already paid the money over to the Loray.

In further illustration that these entries were not *bona fide* let us take a letter written by the Wells Company to Love on December 18, 1900 (p. 134), where the company says, "We presume our recent shipments are now in and if so please remit as soon as possible as we stand very much in need of same." Love now contends that when he received this letter of December 18 he did not owe the Wells Company a single dollar, because he claims that on December 3, 1900, he had made application of the funds and had balanced the account and none of the invoices had become due between December 3 and December 18. Notwithstanding this fact Love made no reply to the letter of December 18 and did not set up the claim which he now makes that the account had already been settled by the payment of the stock subscription. Again, on January 2, 1901, the Wells

Company wrote a letter (p. 137) again calling for money from Love and referring to the shipments made since the middle of November, and saying, "We see no reason why we should not be paid according to the understanding." To this letter Love made no reply. The Wells Company went so far as to send a dun twice by telegram, on January 7, 1901 (p. 118), and on January 31, 1901 (p. 138). During all this time never a word from Love as to the forty-thousand-dollar ($40,000) entry on his books, and in fact he expressly admits (p. 94) that he did not give the company any notice whatever that he had charged up this forty thousand dollars ($40,000) against the account of the Wells Company.

During all the time that Love was paying these funds over to "assist the Loray" the Loray mills had not been organized, and there was no one who could have lawfully received funds for the Loray mills.

Another most pertinent fact, already alluded to, showing that Love was not claiming the right to make these credits is that when he wrote the letter of February 2, 1901 (p. 62), notifying Wells that he had paid in the $50,000, he requested Wells to have his house credit their accounts with the amount. If he had considered that the credits which he had already made on August 3, 1900, and on December 3, 1900, were *bona fide*, no one can doubt but that he would have asked that those amounts be credited as of the dates when they were paid, because it would have made a difference in interest of nearly $800 to have had the sums credited in August and December, 1900, rather than to have had the whole sum of $50,000 credited as of the date of the letter of February 2, 1901. In this letter he merely requests Wells to arrange the credit, and he does not once put it as a matter of right, nor does he say that he had entered any credits himself. He was evidently awaiting permission to do so.

This letter of February 2, 1901, in which Love makes the request that Wells would have his house credit the fifty thousand dollars ($50,000), also shows conclusively that Love did not understand that his endorsement on the letter of August 3, 1900, had been taken as a credit of ten thousand dollars ($10,000), because if ten thousand dollars ($10,000) had been credited on August 3, 1900, then Love would have requested a credit of only forty thousand dollars ($40,000) on February 2, 1901.

All of the circumstances mentioned above, and many others which will be found in the record, go to show conclusively that Love did not consider that the book entries and alleged "settlements" were *bona fide*, but that he was merely making them in order that his books might show up on examination, and more particularly because he was in such desperate need of money for the Loray mills and he desired to have the respondent and the Avon mills "assist the Loray."

Finally, as further evidence of Love's methods of business, we find that he admits that he did not give W. L. Wells notice of the meeting of the stockholders of the Loray mills (p. 98); and yet Love went into the meeting of the stockholders of the Loray mills and acted as proxy for W. L. Wells and admitted that he had no authority whatever to do so (pp. 91–92).

Authority of W. L. Wells.

An attempt has been made in this case to magnify the authority which W. L. Wells had as president of the W. L. Wells Company. It is claimed that he was the general manager of the company, but there is no testimony to support such a contention.

The facts show that he subscribed for one-half of the capital stock, John T. Wells for one-fourth, and George Butterworth for the remaining one-fourth. W. L. Wells was

president, George Butterworth was vice-president, and John T. Wells was secretary and treasurer. All three of these men constituted the board of directors, so that W. L. Wells not only did not have a majority of the stock, but the other two constituted a majority of the board of directors. It is true that W. L. Wells was a man of larger means than either of the other two, but it surely cannot be contended that because one stockholder has larger means than the others that he therefore has greater authority in controlling the affairs of the company than the others who have equal holdings in the corporation.

On page 30 the witness, John T. Wells, was asked if W. L. Wells was not the whole of the concern, to which he replied:

"No, sir. He was not.
"Q. In what particular was he not?
"A. He didn't have the entire management of it and he didn't furnish everything.
"Q. What did he not have control of?
"A. The making of contracts, the selling of cotton and everything else.
"Q. Didn't he generally make the contracts?
"A. He did sometimes."

The witness then proceeded to state that while W. L. Wells transacted the business in North Carolina they all advised about the policy of the business there, held directors' meetings, and discussed the affairs of the company.

John T. Wells was the treasurer, kept the books of the company, and did a large part of the correspondence in this case. It is true that W. L. Wells wrote many letters about the business of the company, to which he signed his own name, but it is a matter of general knowledge that such a practice is common, and it does not thereby increase the authority of the agent who does it.

W. L. Wells had his own private letter book. These private letters were copied in his private letter book, while the letters about the business of the Wells Company, although

signed by him individually, were copied in the letter book of the corporation.

There is nothing in this case to show that W. L. Wells had any authority whatever, other than that a president ordinarily has, nor that he had any power in the making of contracts for the sale of cotton beyond that usually possessed by agents who are appointed for the purpose of making sales.

Subscriptions of Stock to Loray Made for W. L. Wells Individually.

It is not denied that W. L. Wells wrote Love that he would agree to take stock amounting to $50,000 to come in on the last payments of the stock; but it is denied that W. L. Wells ever agreed that any part of the purchase-money of the cotton should be paid on his subscription to the stock. On the contrary, his several letters already referred to distinctly show that he told Love not to "mix up" these accounts with anything else, and he wrote many letters calling upon Love for a payment of the entire amount due for cotton.

It cannot be controverted but that whatever subscription to the stock of the Loray was made by W. L. Wells was made by him for his own individual benefit. The $10,000 subscription was made in the letter of July 15, 1900 (p. 58), in which he said: "You can only depend on *me* for the $10,000;" and in the letter of October 4, 1900 (p. 62), he not only said, "I have arranged to take the $50,000 stock," but he further said, "*I do not want my arrangements with you and the Loray known to them, hence in writing me about this please mark your letters personal.*" It is difficult to see how the personal character of this subscription could have been mephasized more fully.

When Love was asked on the stand how he expected these matters as to the Loray stock to be kept from the Wells Company, he replied (p. 96): "We didn't know how we

would arrange it. He left it entirely with me." Love further admitted (p. 91) that he did mark all the letters "personal," and John T. Wells testified (p. 35) that all of these letters, including the letter of February 2, 1901, came marked "personal;" that he did not open them and knew nothing whatever of their contents.

Besides this, the proposed arrangement contemplated that W. L. Wells should become the vice-president of the Loray and should individually buy cotton for it. So that the arrangement, instead of being for the benefit of the W. L. Wells Company, contemplated that the company should cease to buy the cotton and that W. L. Wells should do it individually (bottom of page 66).

By turning to the remarkable entries of deposits made in Love's bank, found on pages 140 and 141 of the Record, it will be seen that the Loray mills is credited with two payments aggregating $50,000, as made not by W. L. Wells Company, but by W. L. Wells individually, showing that Love treated the stock subscription as W. L. Wells' individual matter.

No Evidence from Which Ratification by Wells Company Could be Inferred.

We have endeavored to show that the entries of credits made by Love were not intended as *bona fide*, but were only for the purpose of enabling him to use the funds of the Wells Company in aiding the Loray mills. If this is true, then there was nothing to ratify, because there could be no ratification of a sham and subterfuge.

But, assuming that Love did make the applications in August, 1900, of $10,000 and in December, 1900, of $40,000 of the funds of the Wells Company in payment of subscription of W. L. Wells to stock of the Loray mills, we nevertheless submit that there was not a *scintilla* of evidence that

such acts were ever known to the Wells Company or were ever in any way ratified by it.

We shall presently show, in the argument, that such an act in diverting the funds of the Wells Company into an investment in stock of the Loray mills for the individual benefit of W. L. Wells was *ultra vires* and could not be ratified as a matter of law; but we are now assuming, for the sake of the argument, that these acts could have been ratified ,and we search in vain for any evidence of such ratification.

At the outset we would have it understood that the alleged agreement between W. L. Wells and John F. Love, as disclosed by the testimony, was not made for the benefit of the Wells Company, and this company never received any benefit from it whatever. The inducement for the making of the contract was that W. L. Wells was to buy cotton for the three mills. This is shown by the testimony of Love (p. 66), where he was asked the question, "What inducement, if any, did you hold out for him to take shares in this enterprise?" to which Love answered that he told him that if he would come in with them and help to get this up they wanted him to be the purchasing agent for the mills of the cotton and buy all the cotton for the three mills, and, if he did so, they would like to make him one of the directors and vice-president of the mill; and on page 96 Love was asked the question, "You wanted Mr. Wells to buy the cotton for the new mill individually?" and answered, "Yes, sir." From this it is apparent that it was not contemplated that the Wells Company should get any benefit from the contract, but rather that W. L. Wells should supplant it as purchasing agent. The agreement was not to become operative until the Loray mills should be organized, and then W. L. Wells should become the purchasing agent for the three mills—that is, the Loray mills, the Avon mills, and The Gastonia Cotton Manufacturing Company, the respondent in this case. In fact, Love expressly admitted (p. 87) that

there had never been an intimation but that Wells was to continue to buy cotton. In the face of this testimony it cannot be reasonably contended that any of the cotton which was sold by the Wells Company to Love's mills was sold under the terms of this alleged agreement with W. L. Wells, because, as stated above, the alleged agreement was not to go into effect until the Loray mills was organized, and W. L. Wells should then become the purchasing agent for all three of the mills.

It is Hornbook learning that ratification cannot take place without *full knowledge*. We insist that this evidence shows not only that Wells Company did not have full knowledge of the acts of Love, but that it had no knowledge nor notice whatever that any such application of its funds had been made by Love.

Let us take first the $10,000 payment alleged to have been made on August 3, 1900. As to this, Love contends that after receiving the letter of May 18, 1900 (p. 122), telling him not to "mix up" the cotton account with anything else, but to remit the balance due, he proceeded, in a few days thereafter, to "mix up" accounts, and on the 3d of August, 1900, he turned over to the Loray mills the account of W. L. Wells Company, these being part of the same funds which he had so long held in his bank to the credit of the W. L. Wells Company, without their knowledge or consent.

Good faith required that if he was going to take the funds of the W. L. Wells Company and mix them up with the individual subscription, in violation of the instructions that he had received, that he should at least have given the Wells Company immediate and positive information as to what he had done, but instead of this we find that he states (p. 89) that the only notice which he ever gave them was more than a month after the transaction, and even then he gave them no other notice except that contained in the endorsement upon the letter to the Wells Company dated the 31st

of August, 1900. Let us here reproduce this letter with the endorsement:

"VICKSBURG, MISS., *August* 31, 1900.

"Mr. JOHN F. LOVE,

"*Treas., Gastonia, N. C.*

"DEAR SIR: Enclosed we beg to hand you a statement of your account to September 1st, showing balance due us for $12,691.67. May we ask that you remit us by return mail in full for this balance, and oblige.

"Yours very truly,

"W. L. WELLS COMPANY."

(Endorsed by John F. Love.)

"$10,000.00 stock Loray mills.
" 2,691.67 interest.

"$12,691.67 balance.

"We want to see your Mr. W. L. Wells about it when he comes to see us.

"Yours, JOHN F. LOVE, *Treas.*"

How can any reasonable person contend that this endorsement gave the Wells Company notice that Love had already applied $10,000 of the cotton money in payment of the subscription to the stock, or that he claimed the right to make such application? The most that can be said of it is that it was a suggestion or request that he be allowed to "mix up" the cotton account with the stock subscription—a thing which on the 13th of July he had been forbidden to do. That he merely meant it as a suggestion is shown from what he adds, viz: "We want to see your Mr. W. L. Wells about it when he comes to see us." Here Love, as though remembering that W. L. Wells had written him on May 18 not to mix up the cotton account, is at most suggesting that he would like to see Mr. W. L. Wells about it when he came to Gastonia. As a matter of fact W. L. Wells was due in Gastonia about the time this letter with the endorsement on

it was received at Vicksburg (p. 31), and yet Love did not mention a syllable to Wells during the visit of September, 1900, about his having credited the account with $10,000 (p. 89).

Love pretended on his examination (pp. 88–89) that the "it" which he wanted to see Wells about was the item of interest, but that this is not true is shown by the fact that the accounts were due 30 days from date and Love knew this fact (p. 94), and he had received statement after statement calling on him for interest, to which he had not made the slightest objection, but now he would have us believe he was "kicking" about interest. Besides that, it must be admitted here and now that the charge of interest was correct. From all this, it is too apparent for controversy that the "it" which Love wished to see Wells about was the stock subscription in order that he might, if possible, get W. L. Wells to arrange it in some way so that the $10,000 which he had, one month before that, wrongfully and unlawfully taken of the funds of the Wells Company and paid over to the Loray might be allowed to stand, and that he in his financial straits might not be required to pay it back again.

This much can be reasonably inferred from all the facts as they are now known to us, but at that time the Wells Company knew absolutely nothing about these facts, because Love had purposely concealed them and they were not disclosed until on the trial of this action when Love's books were produced in court.

The undisputed fact, as testified to by John T. Wells (p. 35), is that he positively had never heard anything of any subscription to stock of the Loray mills, and that he did not know what Love's endorsement referred to. The letter was filed away among the papers of the company, and nothing was ever said or thought about it, and John T. Wells, the treasurer and bookkeeper of the Wells Company, had not the remotest idea that Love had attempted to take the funds of the Wells Company and pay them over to the Loray

mills. It is also undisputed that George Butterworth, who was director and vice-president, did not know of it and did not assent to it (bottom of p. 35).

In the face of the ambiguous language of the endorsement on the letter, and in the face of John T. Wells' positive testimony that he did not know what it meant, and that the endorsement was never talked over or mentioned in the corporation, and in the face of Love's deliberate refusal to give the company notice of what he had done, it is now contended that this endorsement gave the Wells Company full notice requisite for a ratification of the application of $10,000 of the cotton money to the stock subscription!

But it is contended that after Love returned the letter of August 31, with the endorsement on it, the Wells Company never made demand for the $12,691.67. Upon this failure to make demand it is sought now to deduce the conclusion that the reason no demand was made was because the Wells Company admitted that nothing was due. It is obvious that such a contention is unfounded when we consider that the Gastonia Company must now admit that a part of the $12,691.67, to wit, the sum of $2,691.67, interest, is due here and now. If the failure to make demand shows that the Wells Company admitted that the $10,000 had been paid, it also proves that the Wells Company admitted that the $2,691.67 was not due, and this makes out a clear case of *reductio ad absurdum*, since the Gastonia Company must here and now admit that it owes the interest to the Wells Company.

But we submit that the correspondence shows that during the fall and winter of 1900 the Wells Company did make frequent demands for money. In fact, during the fall Love sent the company $25,000 on general account, and, as no specific application of it was made at the time it was sent, the law would have applied it in payment of the first item of the debit, which was $12,691.67. It is true that some weeks after the $25,000 was remitted Love requested that it be applied to specific invoices, and this was done by the

Wells Company. But the point we make is that Love was remitting money. Now, we are utterly unable to see what difference it could make, if these cotton mills were to be indebted to the Wells Company to the amount of $12,000, why the one item might not as well stand as the other.

Let us now turn to the alleged credit or application on December 3, 1900, of $40,000 of the cotton money on the stock subscription.

Love admits that he gave the Wells Company no notice whatever of having charged them with this $40,000. Both this sum and the $10,000 had been first placed by Love to the credit of the Wells Company in the extraordinary and unheard-of bank account which the Wells Company had in Love's bank, and which the Wells Company never heard of until on the trial of this action. Now, absolutely the only notice which it is claimed that Love ever gave of the $40,000 transaction is contained in the letter written February 2, 1901, by Love to Wells (p. 62), which contains these words:

"I have paid in your $50,000 stock and can send you certificates at any time in any way you suggest, and before issuing them will await your advice. Please have our account with your house credited with the amount."

Now, as to this letter, it may not be improper to call the attention of the court again to the fact that when it was offered in evidence we objected to it (p. 25), and it appears from the record (pp. 111–112) that his honor Judge Boyd admitted it, and also the letter from Wells to Love of October 4, 1900, subject to the requirement that it should thereafter be shown in the evidence that the Wells Company had authorized the application of these funds or had ratified it. At the close of defendant's evidence we moved to strike out all this testimony because no such antecedent authority nor subsequent ratification on the part of the Wells Company had been shown, and his honor held with us and thus, in effect, ruled out both the letter of October 4, 1900, and this

letter which we are now considering, dated February 2, 1901 It would seem, therefore, if this ruling was correct, that neither one of these letters should be considered unless the court should hold that Judge Boyd was in error in ruling them out.

But for the sake of this discussion let us consider that all of the evidence ought to have gone before the jury, and we will therefore examine the facts surrounding the letter of February 2, 1901.

In the first place it was in reference purely and solely to the affairs of the Loray mills. It was marked "Personal" by Love for the express purpose of keeping the Wells Company from knowing anything about it. It did not profess to be in reply to any letters or telegrams theretofore received from the Wells Company, but its contents will disclose that it was purely personal. In the letter of October 4, 1900, Wells had notified Love that he did not want his associates to know anything about the Loray stock subscription and had requested Love to assist him in keeping it from his associates by marking his letters "Personal." Not only did Love admit (p. 91) that he marked the letters "Personal," but J. T. Wells testified (p. 35) that this letter and others came addressed to W. L. Wells marked "Personal," and that he did not open them, knew nothing of their contents; that Mr. Butterworth was in Yazoo City and could not have known of them, and that he (J. T. Wells) never learned anything about Love's letter of February 2, 1901, until after this suit was brought.

Here, then, was an agreement between Love and Wells to keep the matter of the Loray stock subscription a secret from the Wells Company, and in pursuance of that agreement Love wrote a letter about Loray matters, stating that he had paid in the $50,000 subscription which Wells had made—marked the letters "Personal" for the express purpose of keeping it from the Wells Company—and yet it is now gravely contended that a jury should have been allowed

to find that the Wells Company did know all about this letter, and had full knowledge of it requisite to constitute a ratification!

But looking at the contents of the letter itself we find that there is nothing to ratify. Counsel for plaintiff in error have treated this letter as though it gave full information of all that Love had done, while on the other hand we maintain that if the letter itself had been addressed to the Wells Company it did not contain any information whatever from which the Wells Company could have inferred that Love had already applied $50,000 of their money to the payment of the stock subscription, nor even that he claimed the right to do so.

Love says in this letter that he, individually and personally, had paid in for W. L. Wells, individually and personally, the sum of $50,000, and he merely requests W. L. Wells to make some arrangements whereby these payments could be credited up on the accounts between Love's mills and the Wells Company. Suppose that, instead of using the language he did, Love should have written to the Wells Company itself, stating that he had paid an individual debt of W. L. Wells amounting to $50,000, and he had asked the Wells Company to allow him a credit for that amount. Would any reasonable man argue that such a request would amount to full notice that he had already made the credit himself, or that it amounted to a claim that he was entitled to the credit as a matter of right? The point we make here is that the letter was merely a request and there was nothing in it which could be ratified by the Wells Company other than the affirmative granting of the request.

But it is said that Love did not intend that this should be kept from the Wells Company. If that is true, then we ask why did he mark the letters "Personal," or, stronger still, if he thought that he was entitled to a credit from the Wells Company as a matter of right, why did he not address the letter to the company itself, resenting the telegraphic

duns and stating that he had already paid them the sum of $50,000 in the way of a subscription to stock of the Loray mills? The fact that he asked W. L. Wells to have his house credit the Avon and Gastonia mills with the $50,000 is by no means inconsistent with the idea that he expected W. L. Wells still to keep the matter a secret. Love testified (p. 96), when asked how he expected to keep this from the Wells Company, that W. L. Wells trusted to him, and the way he undertook to keep the matter from the company was by marking the letters "Personal." Knowing the desire of W. L. Wells that the matter should be kept from the Wells Company, the natural inference was that W. L. Wells would give the company his check for $50,000 and say nothing about the Loray subscription. Wells had asked to have it kept secret and Love had no reason to suppose that Wells wanted it known at that stage. It is as though Love had written to Wells:

"I have paid $50,000 for you. My mills owe your company $50,000. It is useless for me to remit your house the $50,000, and hence you, instead of sending me the $50,000 you owe, can pay it to your house and get the house to give my mills the proper credit, and you can do this without letting them know anything about the Loray subscription. I have marked this letter 'Personal' in order that you may arrange it in your own way and keep the matter from the Wells Company."

But it is urged that the Wells Company did not make any demand on Love after that letter of February 2, 1901, was received, and from this it is contended that the Wells Company knew of it and ratified it.

We have already shown from the very nature of the letter that it was merely a request, and there was nothing to ratify, and could have been no ratification except by an affirmative granting of the request. The letter was not a statement that Love had made any application whatever of the credits.

But the uncontradicted testimony was that J. T. Wells,

who was treasurer and bookkeeper and had charge of the office of the Wells Company, knew nothing about this letter until after this suit was brought (p. 35). The uncontradicted testimony was (p. 36) that J. T. Wells, during the spring of 1901, asked W. L. Wells several times about the account and that W. L. Wells said that Love was hard up, and advised J. T. Wells not to push the Gastonia and Avon mills (bottom of p. 36). Here was a clear, reasonable, and uncontradicted explanation of the delay on the part of the Wells Company to make any demand, and shows that during this time the Wells Company had no notice whatever of the letter of February 2, 1901, and that its failure to make demand for the money was in no sense due to the receipt of that letter. How, then, could a judge, in the face of this testimony, have allowed a jury to find, from the mere fact of the failure to demand payment of the account with the Wells Company, that the company knew about the letter and had solemnly agreed to ratify the transaction and agreed to allow the credit of $50,000?

Besides this, J. T. Wells testified (p. 36) that these mills had owed the Wells Company large amounts before and that during the spring of 1901 they began selling them for cash. In addition to this, Love had always contended that the Wells Company had agreed to carry his mills for as much as $65,000, and he gave the Wells Company this as a reason for not responding to their duns (p. 83). The Wells Company had written in a letter (p. 115) that it would carry Love's mills for from $60,000 to $70,000, yet it is now contended that because the Wells Company carried Love's mills for $65,000 for several months this fact must be invoked to prove the ratification of the $50,000 payment.

But, again, the argument is that the failure to make demand after February 2, 1901, tends to show that the Wells Company admitted that nothing was due, but, unfortunately for the plaintiff in error, this argument proves too much. The Gastonia Company here and now admits that it owed

several thousand dollars to the Wells Company during all this time. How, then, can it be seriously contended that the failure to make demand during the spring of 1901 proved, or tended to prove, that the Wells Company allowed this $50,000 payment, when it is here and now admitted that during all that time the Avon and Gastonia mills really owed several thousand dollars?

Whatever inference might otherwise be drawn from the delay of the Wells Company to make demand, it is nevertheless true that they did make a demand for the whole amount in a letter of August 12, 1901 (p. 57), and no one can doubt for a moment that if Love had really believed that his mills were entitled to the credit of fifty thousand dollars ($50,000) he would have replied to this letter by return mail, asserting his rights in the premises, yet he made no reply, and, as already stated, he admitted that he never once asserted his right to the credit until October, 1901, when the attorney for the Wells Company threatened him with suit (p. 101).

It is further suggested that the fact that W. L. Wells was not put upon the stand could be used against the Wells Company as tending to show that it was afraid of his testimony, and that the jury might have been allowed to draw conclusions from the failure to put him on the stand. This seems plausible at first blush, but an examination of the facts will show that there is absolutely nothing in the contention. It is true that W. L. Wells was in the court-house during this trial. The record discloses that when the plaintiff's case was opened the Wells Company put J. T. Wells, the treasurer and book-keeper, upon the stand and proved the account by him, and proved by him the organization of the Wells Company. Here the Wells Company rested its case, because upon the plea of payment the burden was upon the Gastonia Company. When the Gastonia Company undertook to make good its plea of payment it introduced certain matters in evidence in reference to what passed between Love and W. L. Wells in

regard to the stock subscription. To all of these matters the Wells Company duly objected, but at that stage his honor stated that he would admit the evidence subject to the requirement that the plaintiff in error should show either that W. L. Wells had authority to bind his company or that the company had ratified the act. When the evidence of the plaintiff in error was closed we moved that all of the testimony as to what had passed between Love and Wells should be ruled out, and Judge Boyd then and there held that no antecedent authority nor subsequent ratification on the part of the Wells Company had been shown, and he then and there stated that as the case stood he would instruct the jury that the defendant had not made good its plea of payment. Now it is contended that in spite of this ruling of Judge Boyd at the close of the defendant's case the W. L. Wells Company should have replied to the testimony and should have put W. L. Wells upon the stand to contradict the statements of Love, although his honor had ruled the evidence out and held that it was wholly insufficient of itself to establish the defendant's plea of payment. From all this it is too apparent for argument that no inference can be drawn which is hurtful to the Wells Company from the fact that W. L. Wells was not put upon the witness stand.

It may be said in this connection that, while W. L. Wells himself was not put upon the witness stand, letters written by him were introduced, and in every single one of them he flatly contradicted the testimony of J. F. Love as to any agreement on his part to have the funds due his company "mixed up" with the stock subscription of the Loray mills, and in the very letter of October 4, 1900, in reference to the $50,000 subscription, he distinctly wrote that he desired to pay his subscription himself and let it come in on the last payments during the month of January, as he could not arrange his personal affairs so as to do it earlier.

Now, in the face of the fact that Love marked the letter of February 2 1901, as personal and did all he could to

keep the Wells Company from knowing its contents; in the face of the fact that J. T. Wells, the only witness on the point, swears positively that he knew nothing about the letter of February 2, 1901, and that the failure to make demand during the spring of 1901 was not due to that letter and was not due to any agreement on the part of the Wells Company to allow the credit; in the face of the fact that Love always claimed that the Wells Company had agreed to carry his mills for $65,000; in the face of the fact that the plaintiff in error now admits that it owed several thousand dollars during the spring of 1901, when no demand was made, it is nevertheless now insisted that Judge Boyd should have left it to the jury to say whether the bare fact that the Wells Company had indulged the Gastonia and Avon mills and had not made demand for several months was not sufficient evidence to show that the Wells Company, with full knowledge of the facts, had ratified the $50,000 payment. If this should have been done, then, we submit that it is the first time in the history of jurisprudence that a party who had done all in his power to keep another party from finding out a fact would nevertheless be permitted to come into court and have the jury find as an inference that, in spite of his effort, the other party had found out the fact, and, with full knowledge, had ratified the act which he had endeavored to keep from him!

RESTATEMENT OF CONTENTIONS OF WELLS COMPANY AS TO ALLEGED SETTLEMENT OF AUGUST 3, 1900, AND DECEMBER 3, 1900.

We give here a restatement of our contentions as to the alleged settlements of August 3 and December 3, 1900, which are pleaded in the answer. We shall give first our positions which are applicable to both of these alleged settlements, and then the positions which are applicable to each one

separately. Many of these positions will be argued more at length in the succeeding part of this brief.

(1.) Respondent in its answer and through its counsel on the trial having admitted the debt to have been contracted exactly as alleged in the complaint, and having set up the affirmative plea of payment and settlement, the burden of proof as to this issue was on the respondent, and it was necessary that the respondent prove, by competent evidence, every material fact necessary to make out the pleas of payment and settlement.

(2.) It is admitted that the respondent did not produce a single statement of account marked paid (R., p. 86). Remittances were always made by specific invoices, and it is admitted that many of the invoices were never marked paid.

(3.) There has been an absolute failure on the part of the respondent to show that two of the officers of the Wells Company, John T. Wells and George Butterworth, ever knew anything about these alleged settlements or ever assented to them. Indeed the same is true also of W. L. Wells, as there is no evidence that he was ever informed by Love of these alleged settlements.

(4.) The book entries made by Love were a sham and a subterfuge—were never intended by him to be settlements and never so treated by him. They were intended merely to make his books appear to be balanced, and particularly to enable him to "assist Loray."

(5.) Love never made any contention that the $50,000 of the money of the Wells Company had been paid to the Loray mills until a few weeks prior to the commencement of this action when threatened with a lawsuit, and even then, in his conversation with plaintiff's attorney, he did not give

the attorney any information of the nature and terms of the alleged agreement with W. L. Wells, but merely stated he would, if sued, claim a credit. In his letter of February 2, 1901, he did ask W. L. Wells to have the Wells Company credit Love's mills with the $50,000, but this was merely a request which all the evidence shows was never complied with. It required an affirmative assent to this request on the part of the Wells Company, with full knowledge of all the facts, before the credit could have been allowed.

(6.) The petitioner denies that W. L. Wells ever authorized Love to apply the money of the Wells Company to the payment of W. L. Wells' individual subscription, and claims that the letters of W. L. Wells and the replies of Love all show that there was no such agreement; but conceding that there was such an agreement, then the Wells Company contends that W. L. Wells had no authority, either express or implied, to make any such agreement.

(7.) There is no contention that W. L. Wells had express authority to make the alleged agreement, and it is manifest that he had no such implied authority for the following reasons: (*a*) W. L. Wells was the president of the Wells Company and its agent to sell cotton, and there is no evidence that he had any authority other than that usually possessed by the president of a corporation and by its selling agent; (*b*) W. L. Wells, as agent of the Wells Company for the sale of cotton, had no implied authority to accept anything but money in payment of cotton; (*c*) the alleged agreement was so unusual and so much out of the ordinary course of business that no agent could be presumed to have power to make such a contract; (*d*) the contract was not for the benefit of the Wells Company, but for the personal and individual benefit of W. L. Wells, and according to Love's testimony the consideration, or, to use his own language, the "inducement" (R., p. 66), for making the agreement was

that W. L. Wells should supplant the Wells Company as purchasing agent for the three mills as soon as the Loray mills was organized. No agent could be presumed to have authority to make a contract detrimental to the interests of his principal; (*e*) even if the Wells Company were a partnership, as held by the Circuit Court of Appeals, then W. L. Wells, as one of the partners, could not be presumed to have authority to make a contract for his partnership which was for his own benefit and to the detriment of the interests of the partnership.

(8.) There is no evidence of ratification by the Wells Company of either one of the alleged settlements: (*a*) It is the plainest principle of law that the Wells Company could not be held to have ratified these settlements unless it was shown that the company had full knowledge of all the material facts pertaining thereto. The burden of proof upon this point was upon the respondent and it has wholly failed to show facts from which it could be inferred that the Wells Company, with full knowledge, ratified the "settlements;" (*b*) the uncontradicted testimony is that the Wells Company did not have any knowledge whatever that Love had attempted to apply what was due it to the payment of W. L. Wells' subscription; (*c*) it is submitted that the evidence shows that W. L. Wells himself did not have any notice that Love had applied the Wells Company's money to the payment of his subscription, but, conceding that W. L. Wells had notice of it, the knowledge of W. L. Wells could not be imputed to the Wells Company for the reason that he was acting for himself individually, and knowledge acquired by him in a matter in which his interests conflicted with the interests of the Wells Company could not be imputed to the Wells Company; (*d*) ratification of an act whereby $50,000 of the money of the Wells Company was applied in payment of W. L. Wells' individual subscription could not have been effected so as to bind the Wells Company except

by the corporate act—that is, by the action of the board of directors of the Wells Company. There is no contention that the board of directors ever acted upon the matter, but, on the contrary, the uncontradicted evidence shows that John T. Wells and George Butterworth, two of the directors, owners of one-half of the capital stock, who were treasurer and vice-president respectively, never in any way assented to this misappropriation of the funds of the W. L. Wells Company; (*c*) the Wells Company never received any benefit from the alleged agreement, but, on the contrary, one of the important stipulations of the agreement was that W. L. Wells should supplant the Wells Company as purchasing agent for Love's mills. The agreement was not to become operative until the Loray mills was organized, and then W. L. Wells was to become the purchasing agent for the Loray mills, the Avon mills, and the respondent, The Gastonia Cotton Manufacturing Company. Not a bale of cotton was ever sold by the Wells Company to Love's mills by virtue of or under the terms of this alleged agreement.

(9.) The alleged agreement, whereby $50,000 of the money of the Wells Company was to be applied in paying a stock subscription of W. L. Wells, was *ultra vires* of the Wells Company as a corporation, and, the contract being *ultra vires* of the corporation, it follows that it was incapable of ratification, and that even if the Wells Company had received benefits under it this could not amount to a ratification of an *ultra vires* contract.

(10.) The bringing of this suit was not a ratification of the alleged agreement between Wells and Love, because (*a*) not a bale of the cotton in controversy was sold under the terms of that agreement; (*b*) the complaint alleged the sale and delivery of cotton under several contracts, and the answer admits these several contracts. There was a demand for cash with each invoice and an agreement in

writing on the part of Love to pay cash or, to use his own language, to "remit promptly" (R., p. 127); (c) even if the cotton in question had been sold under the terms of the agreement alleged in the answer, yet all the evidence shows that the Wells Company knew nothing of the vicious element in the contract until after it had parted with the cotton, and it is a plain rule of law that where a party does not learn of the vicious element in the contract until it is too late to repudiate the contract and save himself harmless, then the bringing of a suit upon the contract does not ratify it.

(11.) It may be noted, finally, that the respondent wholly failed to make out the plea set up in the answer in regard to these "settlements." It is alleged in the answer that "W. L. Wells, in order to secure the sale of said cotton to the defendant, agreed with the said John F. Love that if he, as agent of the defendant, would agree to purchase cotton from the said Wells, or from the partnership or corporation represented by him, a portion of the purchase-money due for said cotton might be invested in the stock of the said proposed manufacturing plant, which was known as the Loray mills, and defendant avers that said cotton was purchased by its agent and manager with the express understanding that the defendant should use a part of the purchase-money in that way." The defendant further alleges that the "settlements" were had "in strict accordance with the terms of the contract." There is not a word of the testimony which supports this allegation. Not a bale of cotton was sold by the Wells Company as a result of the alleged agreement. On the contrary, the agreement, as testified to by Love himself, shows that the cotton which is in controversy was not sold in consequence of this alleged agreement, for Love admitted that there never was a suggestion that Wells should cease to sell him cotton (p. 87). There was, therefore, a total failure of proof to support this most material allegation.

(12.) The answer further alleged that the agreement between Wells and Love was that the money of the Wells Company was to be "invested" in stock of the Loray mills—plainly meaning by this to allege that the Wells Company was to own the stock in the Loray mills which should be thus purchased. The evidence all tended to show that the stock subscription was that of W. L. Wells individually and that it never was contemplated that the Wells Company should own any stock in the Loray mills. The answer alleged that the "settlements" were made "in strict accordance with this agreement," whereas the proof showed that if any "settlements" were made at all they were not made in accordance with the terms of the contract set out in the answer, but were made pursuant to a totally different contract. There was, therefore, an entire failure of proof, also, upon this material allegation.

(13.) Judge Boyd refused to permit the jury to find that the Wells Company had ratified any appropriation of its money to the payment of the stock subscription of W. L. Wells, because the only possible phase of the case in which there could have been such a finding by the jury was that by the silence of the W. L. Wells Company and the failure to demand money there might have been an inference of ratification on its part if this had been unexplained, but Judge Boyd held that the explanation made by John T. Wells was entirely satisfactory, and when John T. Wells testified positively that the Wells Company had not ratified this misappropriation of the company's money and testified that the Wells Company knew nothing about these alleged "settlements," the judge, seeing his demeanor upon the stand and taking his testimony in the light of the vacillating and unsatisfactory testimony of John F. Love, would not permit the jury to find that John T. Wells had sworn falsely. He therefore ruled that the ends of justice required him to hold that there had been no ratification on the part

of the Wells Company, and that he should direct a verdict in favor of that company. It is respectively submitted that under a long line of decisions a Federal appellate court should not reverse this ruling of Judge Boyd.

CONTENTIONS AS TO ALLEGED SETTLEMENT OF AUGUST 3, 1900.

Having stated above our contentions applicable to both of the alleged "settlements" relied upon, we wish now to summarize the positions taken by us, which apply particularly to the alleged "settlement" of August 3, 1900.

(1.) There has been a total failure of proof that W. L. Wells authorized Love to apply the $10,000 of the Wells Company's money to the payment of his stock subscription. On the contrary, the written evidence, and particularly the letter of W. L. Wells of May 18, 1900 (R., p. 122), proves conclusively that he expressly refused to allow the company's money to be "mixed up" with his individual subscription.

(2.) If W. L. Wells did not authorize this application of the company's money before it was made, then there is not a scintilla of evidence that W. L. Wells knew anything about Love's attempt to charge the Wells Company with this $10,000. When the letter of August 31, 1900, with Love's endorsement on it, reached Vicksburg, W. L. Wells was not there, and John T. Wells testified that he never mentioned it to W. L. Wells. Love testified likewise that he did not mention the matter to W. L. Wells. So by the uncontradicted testimony W. L. Wells knew nothing of the alleged "settlement" of August 3, 1900, and could not have ratified it.

(3.) George Butterworth, the vice-president and one of the directors, knew nothing of Love's endorsement on this letter

of August 31, and there is no evidence to support any contention that he ratified the "settlement."

(4.) By the uncontradicted testimony of John T. Wells, who received the letter with Love's endorsement on it, he did not understand what it meant. He was the treasurer of the company and in charge of its home office, and he did not treat this as a "settlement." The books of the Wells Company for the season 1899–1900 were not balanced, but the full amount as now claimed by the plaintiff was left standing as due and unpaid.

(5.) Love admits that he gave the Wells Company no notice of the "settlement" of August 3, 1900, and it is a strange "settlement" that can be made without the knowledge or assent of the party whose money is being used in the "settlement." The endorsement which Love made on the letter of August 31 could not be construed by the wildest imagination into a notice of a "settlement" made on August 3, nearly thirty days prior thereto.

(6.) The endorsement of Love on the letter of August 31 was at most merely a suggestion that Love desired to apply $10,000 of the money due for cotton to the payment of Loray stock, and that he desired to see W. L. Wells about it. It was in no sense a statement that he had already made the application. If Love had supposed that there had been a "settlement" he could and would undoubtedly have so written in plain and unambiguous language.

(7.) This endorsement made by Love, being merely a suggestion, required positive affirmative action on the part of the Wells Company accepting it, and mere silence or failure to act could not be treated as ratification.

(8.) But we have the positive and uncontradicted testimony of John T. Wells that the Wells Company did not as-

sent to the suggestion or request made by Love. No Federal judge could have permitted a jury to find to the contrary unless he was satisfied that the testimony of John T. Wells was utterly false.

(9.) The failure to demand the specific sum after receipt of the letter of August 31, with Love's endorsement, was no evidence of ratification even if John T. Wells had not explained it, because it is shown that during the fall and winter of 1900 and 1901 Love's mills were largely indebted to the Wells Company and the Wells Company was demanding payments and payments were being made. It could make no difference that this specific sum was not demanded.

(10.) Besides this, the interest on the invoices for cotton sold during the spring of 1900 was due according to the admissions of respondent, and this interest was not demanded specifically. If the Wells Company failed to demand a sum which it must be admitted is still due, it is difficult to see how its failure to demand the $10,000 could be treated as an admission that that sum was not due.

(11.) Love himself did not consider that there had been a "settlement" on August 3, 1900. This is shown conclusively by the fact that in his letter of February 2, 1901, he requested that W. L. Wells would *then, at that date,* have the Wells Company credit the account with the *entire $50,000,* showing unmistakably that he did not consider that the $10,000 had been credited on August 3, 1900.

(12.) Conceding that the endorsement on the letter of August 31 put John T. Wells on notice that there was something relative to the Loray Mills stock and that he negligently failed to prosecute this inquiry, still his negligence, if such it be, could not operate to give the Wells Company notice of what John T. Wells might have found out. It is

a clear rule of law that it was the duty of the respondent to show that the Wells Company *actually* knew all of the material facts connected with a misappropriation of the company's money, and it will not do merely to show that by the exercise of diligence in prosecuting inquiries it might have known the facts. The burden was on the respondent to show *actual* knowledge.

Contentions as to Alleged Settlement of December 3, 1900.

We give here our positions which apply particularly to the alleged "settlement" of December 3, 1900, whereby it is claimed that $40,000 of the money of the Wells Company was applied to the payment of W. L. Wells' subscription:

(1.) This attempted appropriation of the company's money was without the consent of the W. L. Wells Company and in fact without the consent of W. L. Wells himself. The letters which passed between W. L. Wells and John Love during the fall of 1900 show conclusively that the Wells Company was demanding payment for the cotton sold and that Love agreed to "remit promptly" for all cotton bought.

(2.) Love admits that he gave the Wells Company no notice whatever of this "settlement" of December 3. Although repeated demands for payment were made by letters and telegrams during December and January after the book entries had been made, yet Love never at any time claimed that there had been a "settlement" and that the account had been balanced.

(3.) The letter of February 2, 1901, written by Love to W. L. Wells, was marked "Personal," and its contents never came to the knowledge of the Wells Company. It was

objected to by counsel for the Wells Company and was admitted by Judge Boyd, subject to the requirement that it should thereafter be shown that the Wells Company had knowledge of it. The respondent having failed to show that the Wells Company had knowledge of this letter, the letter was thereby rendered incompetent, and it should not be considered in this record, but should be treated as having been ruled out by Judge Boyd. This letter being ruled out, then the respondent will admit that there is absolutely nothing for it to stand upon to connect the Wells Company with the alleged "settlement" of December 3, 1900.

(4.) John T. Wells testified positively that he knew nothing of the letter of February 2. It came marked "Personal," and Love testified that he marked it "Personal" for the purpose of keeping the Wells Company from knowing its contents. It is a strange proposition that the respondent relies solely upon this letter to give the Wells Company notice of the "settlement" of December 3, 1900, when all the evidence shows that it was marked "Personal" for the express purpose of keeping the company from knowing its contents and that the company never knew of it.

(5.) But the letter, if it had been addressed to the Wells Company, was no notice of a "settlement" made on December 3 or at any other date. It was at most a request which required an affirmative action by the board of directors of the Wells Company. Mere silence on the part of the Wells Company could not be treated as acquiescence on its part, and there is a total failure of evidence to show that the Wells Company ever affirmatively acquiesced in the request made in Love's letter of February 2.

(6.) A mere failure to demand payment of money afforded at most only an inference if it had been unexplained. The testimony of John T. Wells explains fully why the demand

for payment was not made in the spring of 1901, and he shows conclusively that it was not because the Wells Company knew of the letter of February 2, 1901, but it was due to the fact that W. L. Wells requested that statements be not sent to Love for the reason that Love was "hard up." No Federal judge would have allowed a jury to find that the Wells Company had ratified the "settlement" of December 3, 1901, unless the judge was satisfied that John T. Wells had testified falsely.

(7.) But it is now admitted that several thousand dollars were due in the spring of 1901, during all the months when the Wells Company made no demand on Love. A failure to demand what was admitted to be due certainly did not cancel the debt, and it is not so contended now by the respondent. The fact that there was a large sum admitted to be due shows that the failure of the Wells Company to make demand cannot be attributed to the fact that the company knew of or assented to this alleged "settlement."

(8.) Finally, when demand was made in August, 1901, there was no contention that there had been any "settlement," and nothing said about it until shortly prior to the bringing of this suit.

DISCUSSION OF PROPOSITIONS OF LAW RELATING TO THE MERITS OF THE ACTION.

First Proposition: Conceding that W. L. Wells made the contract, set out in the answer, agreeing that a part of the purchase-money for cotton sold by plaintiff to defendant should be "invested" in stock of the Loray mills, this was beyond the scope of his authority and did not bind the Wells Company.

We have, in the foregoing part of this brief, endeavored to show from the evidence in this case that W. L. Wells never at any time agreed that the money of the Wells Company should be applied in payment of his stock subscription and have referred to several letters which are in evidence and which show conclusively that he expressly refused to allow Love to use the money of the Wells Company in this way. Passing this point, however, and conceding here for the sake of the argument that W. L. Wells made the agreement exactly as it is alleged in the answer, we submit, as a matter of law, that the Wells Company was not bound by this agreement.

In the first place, it is admitted that respondent did not show by any evidence at all that W. L. Wells had any actual or express authority to bind the Wells Company by this agreement, and we submit that under the facts of the case it is plain that he had no implied authority so to do, and that Judge Boyd was right in ruling that the Wells Company was not bound by the agreement, if any such was made by W. L. Wells.

The evidence shows that W. L. Wells was owner of one-half of the capital stock of the plaintiff corporation and was its president and its agent to sell cotton. There is not a line

of testimony which shows that he had any unusual authority not ordinarily possessed by such an officer and agent of a corporation, and the question of law before the court is whether the president of a corporation who is at the same time its agent to sell cotton has implied authority to bind his principal by an agreement that the money due for cotton sold shall be "invested" in the stock of another corporation.

Eliminating here for the present the point that whatever agreement was made between Wells and Love was plainly for the benefit of Wells individually, and assuming that it was for the benefit of the corporation, our position is that W. L. Wells had no authority to accept anything except money in payment for cotton, that the agreement was such an extraordinary and unusual one and so out of the usual course of business that no agent could be presumed to have such power, and that the burden of proof was upon the respondent to show that the agent had actual authority to make such an agreement.

We submit here only a few of the hundreds of decisions sustaining this view.

In Schutz *vs.* Jordan, 141 U. S., 213, Justice Brewer says:

"A party who seeks to charge the principal for the contract made by his agent, must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend they they had made out a cause of action against the defendant by proving that Hughes had made a purchase in their name. Of course they must go further, and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred. Authority to buy one class of goods would not be authority to buy another and entirely different class. Authority to buy in the usual course of business would not be authority outside of that course of business. And when they rely upon contracts made with Hughes the burden is on them, and continues on them, to establish the contract which in fact was made, and that it was within the scope of his authority as agent."

In Bech *vs.* Donohue, 57 N. Y. S., 741, plaintiff's agent contracted to sell goods to the defendant under an agreement to accept advertising in pay for the bill. The court said:

"Auerbach was merely the special agent. His authority was limited to selling the plaintiff's goods with customary powers incident thereto. An agent empowered to sell cannot, in the absence of specific authority, bind his principal to the acceptance of payment in a medium other than money. Proof of an agency to sell does not warrant inference of authority to contract for advertising. Therefore it was wholly immaterial whether the defendant was notified that Auerbach had no power to pledge the plaintiff's consent to the terms of the memorandum. The position of salesman merely signifies limited authority. The defendant was, as a matter of law, charged with notice thereof, and before trusting to it was bound to ascertain its extent."

In Woodward *vs.* Jewell, 140 U. S., 247, it is said:

"It is a general proposition that power to sell gives authority to sell for cash only."

This case last cited quotes with approval Russell *vs.* Russell, 36 N. Y., 581, where it is held that a power to sell confers authority upon the agent to receive cash only, and does not permit him to convey property in satisfaction of a debt due by his principal, although the debt be a valid one.

In Brown *vs.* Smith, 67 N. C., 245, it is said:

"When an agent is authorized to sell property, he must sell for money, unless special instructions take it out of the general rule."

In this case the agent sold for Confederate bonds.

In Meacham on Agency, section 352, it is said:

"Mere authority to sell gives an agent no power to exchange the chattels for other property, or to take anything else than money in payment for them."

In Mora *vs.* Murphy, 23 Pac., 63 (Cal.), it is said:

"A power to sell and convey is *prima facie* a power to sell for money, usually for cash paid. To give it any other meaning there must appear to be some usage or custom in the country where the power is to be exercised modifying the *prima facie* significance of the power conferred. The same is true of a power to agree to convey and sell or sell and convey."

In Frost *vs.* Erath, 26 Am. State Rep., 831, *it is said:*

"The power to sell and convey does not include the power to convey in discharge of a debt or claim."

In St. John, etc., Co. *vs.* Cornwell, 35 Pac., 785, the court ruled that a general agent of a foreign corporation, having complete charge of its lumber yard, had no authority to agree to credit the amount of an agent's board upon the amount due by the defendant to the corporation for lumber sold.

We shall presently argue that the contract was *ultra vires* of the Wells Company, and, if so, it was a contract which the Wells Company itself could not make. If the Wells Company had no authority to make the contract, then there is no presumption that one of its officers or agents had such power, for it is a rule of law that an agent is never presumed to have authority to do what his principal cannot do.

In Alexander *vs.* Cauldwell, 83 N. Y., 480, the court passed upon the very question under discussion, and in the course of the opinion said:

"It can never be presumed that an agent of a corporation had authority to transact business which the corporation itself was not by its charter authorized to engage in."

To the same effect is Dabney *vs.* Stevens, 2 Sweny, 415.

Second Proposition: The alleged agreement as to applying money due for cotton in payment of stock of the Loray mills was clearly for the individual benefit of W. L. Wells, and the respondent, having been put on notice of that fact, was bound to know that W. L. Wells did not have authority to apply the funds of the Wells Company in payment of his individual subscription to stock of the Loray mills.

We understand it to be admitted by counsel for the respondent that the stock subscription made by W. L. Wells was for himself individually and not for the Wells Company. It is alleged in the answer that the agreement was that a portion of the proceeds of cotton might be "invested" in stock of the Loray mills, and by this it is clear that the respondent intended to allege that the stock was to belong to the defendant, but it must be conceded that all the evidence shows that this plea cannot be sustained, and, according to Love's own statement, the agreement undoubtedly contemplated that W. L. Wells should individually own the stock, and, as a part of the agreement, W. L. Wells was to be the vice-president of the Loray mills and the cotton buyer for all three of Love's mills. We have referred to this at some length in the former part of this brief.

Assuming, then, that W. L. Wells made an agreement with John Love whereby the money due the Wells Company for cotton should be applied in payment of the individual subscription of W. L. Wells to stock of the Loray mills, we submit that no argument nor citation of authority is needed to support the contention that W. L. Wells had no implied power to make any such agreement, it being conceded that he had no *express* authority from the Wells Company to make such a contract.

There is hardly found in the books a clearer statement of

this proposition than that made by Judge Boyd in the opinion written by him, in which he says (R., p. 188):

"From the evidence in this case, the conclusion is irresistible that the defendants were put upon notice that the contract which they allege for the Loray stock was a contract for the benefit of W. L. Wells, individually, and, being thus put upon notice of this fact, they were bound to inquire into the authority of W. L. Wells, no matter how general his powers might have been, as it is a rule of universal application that no agent, however general his authority, can apply his principal's property to the payment of his individual debts without the special authority of his principal; and it is a further rule of law that he who assumes to rely upon the authority of an agent to bind his principal to the discharge of his own obligations must prove actual authority if a contention arises."

In case of West St. Louis Savings Bank *vs.* Parmalee, 95 U. S., 557, Chief Justice Waite, speaking for the court in regard to the authority of a bank cashier to endorse the commercial paper of his bank, says:

"But certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation endorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an endorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser, of a possible want of power to make the endorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is thus suggested to him, it is his own fault, and as against an innocent party he must bear the loss."

A most interesting discussion of this question, and a case on "all fours" with the case at bar, will be found in Park Hotel Co. *vs.* Bank, 86 Fed. Rep., 742 (C. C. A.). This was a case in which the president of the plaintiff company, with gen-

eral powers, had discounted at the defendant bank a note of the plaintiff which the said president had executed and in which he had a personal interest. In discussing the question Judge Sanborn said:

"General authority to conduct the business and to issue the promissory notes of a corporation is authority to do those acts for corporate purposes, and in the interest of the corporation, only. It does not include the power to do them for the exclusive benefit of others, to the detriment of the corporation. And while a promissory note, made by an agent or officer having such authority, in the usual form, and taken by a stranger in the ordinary course of business, carries with it the presumption that it was issued for corporate purposes, and under lawful authority, a note issued by such an agent, payable to himself, is accompanied by no such presumption, but is itself notice that it is without the scope of his general power, and that it does not bind his principal, unless its execution was specially authorized by the corporation, through its directors or officers, other than the agent to whom it is payable. Such a note is a *danger signal*, which the discounter or purchaser disregards at his peril. It is notice to him that, if it is contested, he cannot recover upon it under any general authority in the agent, or at all, unless he proves that the agent was specially authorized to make that particular transaction, or to make contracts of the corporation with himself. To the general rule that the acts and contracts of a general agent, within the scope of his powers, are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely rely or recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or to make the contract (West St. Louis Sav. Bank *v.* Shawnee Co. Bank, 95 U. S., 557; Bank *v.* Wagner (Ky.), 20 S. W., 535, 537; Smith *v.* Association, 78 Cal., 289, 293; 20 Pac., 667; Mor. Priv. Corp., par. 517; State Nat. Bank *v.* Newton Nat. Bank, 32 U. S. App., 52, 58; 14 C. C. A., 61, 64, and 66 Fed., 691, 694; Bank *v.* Armstrong, 152 U. S., 346, 352; 14 Sup. Ct., 572; Chrystie *v.*

Foster, 26 U. S. App., 67, 72; 9 C. C. A., 606, 609, and 61 Fed., 551, 553; Bank *v.* Atkinson, 55 Fed., 465, 472, 474; Chaflin *v.* Bank, 25 N. Y., 293, 295, 299, 301; Gallery *v.* Bank, 41 Mich., 169; 2 N. W., 193; Chamberlain *v.* Wool-Growing Co., 54 Cal., 103). This exception is a striking illustration of the policy of the law to prevent the possibility of a conflict between the duty and the personal interest of an officer or agent. It prohibits him from acting for both himself and his principal wherever their interests clash, and makes every act and contract in which he violates the inhibition voidable at the election of his principal. It forbids him to act at the same time as vendor and purchaser, or as lender or borrower, or as promisor and promisee. It forbids him to sell as the agent of his principal, and to buy for himself; to promise as the agent of his principal, and to accept the promise and reap the benefits himself."

In Chrystie *vs.* Foster, 61 Fed., 551, Judge Wallace, speaking for the Circuit Court of Appeals, said:

"He who assumes to rely upon the authority of an agent to bind his principal to the discharge of the agent's own obligation, must prove actual authority, if contest arises. No principle of the law of agency is better settled than that no person can act as the agent of another in making a contract for himself."

In Wilson *vs.* Railroad Company, 120 N. Y., 145, the rule of law controlling this question is graphically stated as follows:

"The general rule is that one who receives from an officer of a corporation notes or securities of such corporation in payment of or as security for a personal debt of such officer, does so at his peril. *Prima facie* the act is unlawful and unless actual authority is shown the person will be deemed to have taken them with notice of the rights of the corporation."

This case was approved in Wheeler *vs.* Holmes Savings Bank, 58 N. E., 598 (Ill.).

In the recent case of Hier *vs.* Miller, 63 L. R. A., 95, the

Supreme Court of Kansas, discussing the question as to whether a person dealing with the cashier of a bank must be presumed to know that the cashier had no authority to use the funds of the bank for his own private uses, says:

"But he could not absorb the funds of the bank in the satisfaction of his private debts without an express and especial authorization. The office of cashier does not import such power. Whether or not such authority actually did exist the defendant was bound to inquire. It has been well understood from of old that no man can serve two masters. He will hold either to one or to the other. For a like reason the cashier could not serve both himself and the bank in a single transaction, and because he was attempting such a perilous thing the defendant was put upon guard as to the extent of his power. 'It is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time.'"

We could cite hundreds of cases from all the courts of the land sustaining this position, but we do not deem a further citation necessary.

It is immaterial whether the agreement to misappropriate the property of the corporation is made at the time the contract is entered into or *at any* subsequent period. Whether the contract is executory or executed, the doctrine applicable is the same, and the law places its seal of condemnation on all such transactions. It is the *kernel* which is rejected without regard to the form or appearance of the *shell*.

An agent cannot stipulate *in advance* for some unauthorized benefit to himself in any contract he makes for his principal, nor can he obtain that benefit out of the consideration of a *completed* or *closed* transaction made on behalf of that principal. It is the *unauthorized* diversion of the property of his *principal* to his own use which is prohibited, and the *date* of the conversion is of *no* importance where the statute of limitation does not apply.

Even if it were true that the plaintiff was a copartnership, as the Court of Appeals seems to hold, no advantage would

result to the defendant under the facts of this case in any ruling which transforms an organization which is solely intended by the parties connected therewith to be a corporation into a copartnership, for it would be also an unprecedented holding that the member of a copartnership without capital, or with a capital of ten thousand dollars accruing from its first year's profits, could use every dollar of that capital and forty thousand dollars more of the funds of the copartnership without the knowledge and approval of both of his other two partners in the payment of his individual subscription of fifty thousand dollars to the capital stock of another corporation yet to be formed, or even already organized. No such misuse of the funds of either a corporation or a copartnership would be or could be upheld, and as a result only one conclusion could be reached on the merits of this case.

Third Proposition: Ratification by the Wells Company will not be implied, because it has not been affirmatively shown that the Wells Company after full knowledge of all the material facts did some act which might be considered in law as ratification.

In this case we have shown in our statement of the facts that the company had no notice whatever of the facts; that J. T. Wells, the only witness, swore positively that he knew absolutely nothing about the stock subscription; that Love admitted that he had agreed to assist W. L. Wells in keeping the stock subscription matter from the Wells Company, and in pursuance of that agreement had marked the letters about the Loray stock "personal;" and, further, that Love never claimed that he gave the Wells Company any positive and direct information as to what he had done. All these facts show conclusively that the Wells Company had no notice at all of the material facts, whereas it is well established

that ratification cannot be insisted upon unless the principal had *full knowledge.*

We cite below a number of authorities supporting the proposition above stated, and, first of all, we give the statement of the doctrine by Judge Story, which has been quoted more often perhaps than any other rule of the law relating to principal and agent. It is found in the leading case of *Owings vs. Hull*, 9 Peters, 627, where the court says:

"No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously authorized, must, in order to bind the principal, be with the full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud."

In Baldwin *vs.* Burroughs, 47 N. Y., 211, it is said:

"There can be no ratification of an act without knowledge of the act having been done. The ratification of an act previously unauthorized must, in order to be binding, be made with a full knowledge of all the material facts (Owings *v.* Hull, 9 Pet., 608; Nixon *v.* Palmer, 8 N. Y., 398; Seymour *v.* Wyckoff, 6 Seld., 224: Smith *v.* Tracy, 36 N. Y., 79, 83; 2 Greenlf. Ev., par. 66; Story on Agency, pars. 239, 253). The receipt, even from an agent, of money paid him on contract, does not bind the principal to the contract, unless he knows on what account the money was received and the terms of the contract (Penn. Co. *v.* Dandridge, 8 Gill & J., 323)."

In Steam Navigation Co. *vs.* Dandridge, 8 Gill & Johnson (Md.), 157, it is said:

"The county court in instructing the jury as to the facts which it would be necessary to find, to show an adoption and ratification by the defendants of the contract alleged to have been made by their agent, said, that if the consideration for such contract had been received by the agent, and paid over to the defendants, who retained the same, that then the said facts are in law an adoption of the contract, and as binding

upon them as if a previous authority had been given the agent.

"This instruction was held to be erroneous; first, because the jury were not required to find that the defendants knew on what account the money was paid them; and, second, that the defendants knew the terms of the contract on which the money was received."

In Bohart *vs.* Osborne, 13 Pac. Rep., 389, it is said:

"Where an agent makes a contract outside of his actual and apparent power, and the fruits of his contract are received by his principals in ignorance of the material facts, and without any knowledge that the contract had been made in their behalf or names, but were received and retained by them upon the information and understanding that the money was paid to satisfy in part a liability existing against the agent, and in their favor, such receipt and retention will not amount to an adoption and ratification of an unauthorized contract."

In Starr & Co. *vs.* Galgate Ship Co., 68 Fed. Rep., 243, it is said:

"The general rule is well settled that a ratification or confirmation of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistakes, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously authorized acts of an agent (Combs *v.* Scott, 12 Allen, 496; Clark *v.* Lyon, 7 Nev., 75; Reese *v.* Medlock, 27 Tex., 121; Bannon *v.* Warfield, 42 Md., 22; Barnard *v.* Wheeler, 24 Me., 412; Bennecke *v.* Insurance Co., 105 U. S., 355; Owings *v.* Hull, 9 Pet., 607, 629)."

In the leading case of Combs *vs.* Scott, 12 Allen, 496, it is said:

"But, upon another point, we are of opinion that the exceptions of the defendants are well taken. In instructing the

jury upon the question of ratification by the defendants of the contract alleged to have been made by their agent in excess of the authority granted to him, the judge, in effect, told the jury that such ratification would be binding upon the defendants, though made under a material misapprehension of facts, if such misapprehension arose from the negligence or omission of the defendants to make inquiries relative to the subject-matter. In the broad and general form in which this instruction was given, we are of opinion that it did not correctly state the rule of law, and that the jury may have been misled by it in the consideration of this part of the case.

"The general rule is perfectly well settled, that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously authorized acts of an agent. We know of no qualification of this rule such as was engrafted upon it in the instruction given to the jury in the present case. Nor, after considerable research, have we been able to find that such qualification has ever been recognized in any approved text-writer or adjudicated case. And, upon consideration, it seems to us to be inconsistent with sound principle.

"Ratification of a past and complete transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. The true doctrine is well stated by a learned text-writer: 'If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it' (1 Livermore on Agency, 44. See also Paley on Agency, 171, note *o*). Whoever, therefore, seeks to procure and rely on a ratification is bound to show that it was made under such circumstances as in law to be binding on the principal, especially to see to it that all material facts were made known to him. The

burden of making inquiries and of ascertaining the truth is not cast upon him who is under no legal obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger."

This able opinion is cited with entire approval in Benneck vs. Insurance Co., 15 Otto, 355, where it is said:

"The same rule applies to the ratification by the principal of the unauthorized acts of his agent. 'It is perfectly well settled that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified, will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of the agent' (Combs v. Scott, 12 Allen, 496). And it has been declared by this court that: 'No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud.'"

Fourth Proposition: It was necessary to show actual knowledge on the part of the Wells Company in order for any act on its part to amount to ratification, and it was not sufficient to show that the Wells Company or its officers, by the exercise of diligence, might have ascertained the facts.

The defendant has taken the position in this case that although the Wells Company did not know of what had passed between W. L. Wells and Love, yet if in the exercise of diligence the company or its officers could have found out the facts the law will treat it as if the company had actual knowledge. This proposition cannot be successfully maintained.

The undisputed fact is that Love did all in his power to keep the company from finding out the transaction by marking the letters "Personal," and yet it is now contended that the officers of the Wells Company ought to have thwarted Love in his efforts to conceal the transaction, and that they ought to have found out the facts by the exercise of reasonable diligence, and because they failed to exercise this diligence the law will treat the case as though the company had actually known all the facts.

But the defendant argues, as we understand it, that when the letter of August 31, 1900, went back to the Wells Company with the endorsement upon it made by John Love, this should have put John T. Wells on notice that something was transpiring, and that he should have followed this up, and, failing to do this, his company is chargeable with all that he might have found out. Conceding this to be true, it devolves upon the defendant to show that if John T. Wells had followed the matter up he could and would have ascertained all the facts, and particularly that he would have ascertained that there was an agreement between John Love and W. L. Wells, whereby the money due the Wells Com-

pany for cotton was to be applied in payment of W. L. Wells' individual subscription, and, further, that the contract contemplated that W. L. Wells should supplant the Wells Company as purchasing agent of Love's mills. There is not a line of testimony which shows that John T. Wells could have ascertained these facts if he had used the utmost diligence. Love testified that Wells trusted to him to keep John Wells and the Wells Company from finding out the facts (p. 96), and, further, that he did this by marking the letters "Personal" (p. 91), and it may be assumed that he could not have found out from W. L. Wells, because in the letter written by Wells to Love on October 4, 1900 (p. 62), Wells distinctly stated that he did not desire his associates to know about his plans, and for the purpose of having them concealed from his associates he asked that the letters be marked "Personal." Here, then, is affirmative proof that nothing could have been learned about the matter either from John Love or W. L. Wells. There was therefore no testimony from which the jury would have been warranted in finding that the Wells Company could have ascertained the terms of the agreement if its officers had been ever so diligent.

But we deny that the law requires that the principal must use diligence in a case like this to ascertain whether his agent is transgressing his authority, and that he will be held to have ratified the act of his agent if he fails to use diligence in finding out whether the agent has been exceeding his powers. Such a rule is, we submit, subversive of every principle of law. The principal has the right to assume that his agent is not going beyond the bounds of his authority, and he further has the right to assume that persons dealing with him will not be misled so as to rely upon the power of the agent to use the principal's money in satisfaction of the agent's debt. There is no obligation upon the principal to ratify the unauthorized acts of his agent, and, this being true, it must follow that there can be no duty

upon him to ascertain the facts. The following authorities sustain the proposition:

In Combs *vs.* Scott, 12 Allen, 496, already cited, the Supreme Court of Massachusetts says:

"Ratification of a past and completed transaction into which an agent has entered without authority is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make enquiries concerning it. Where there is no legal obligation or duty to do an act there can be no negligence in the omission to perform it."

This was cited with approval by United States Supreme Court in Benneck *vs.* Ins. Co., 15 Otto, 355, *supra.*

And in Murray *vs.* Nelson Lumber Co., 143 Mass., 250 (9 N. E. Rep., 634), the court distinctly held that it was error to tell the jury that the board of directors knew of the acts of one of its officers, provided by the use of diligence they might have known it, and the court held that directors were not presumed to know of the acts of the agents merely because, in the exercise of diligence, they might have ascertained them.

In Smyth *vs.* Lynch, 7 Col. App., 383 (43 Pac., 670), the court says:

"The principal is under no obligation to accept the assumed agent's act. He need neither sanction nor adopt it. The law imposes on him no duty to make inquiries about it. Where there is no legal obligation, the question of negligence or diligence is of no importance. Whoever, therefore, relies on a ratification, is obliged to show it was made under circumstances which in law will bind the principal. The duty of making inquiries and ascertaining what has been done is not cast on the one who is under no legal obligation to take on himself the responsibility, but it rests with the party who would gain a benefit by the enforcement of the contract. The requisite information is justly assumed to be within the reach and control of him for whose advantage the contract was made. Concerning these details

the principal is presumed to be a stranger. While he may not close his eyes to what is within his own control, he is not to be charged because he has failed to make inquiries. He may not be held because he was negligent, or because his information might have been enlarged, or his misapprehension corrected, by diligence to ascertain the facts."

In Oxford Lake Line vs. Bank, 40 Fla., 359 (24 So., 483), the court says:

"Generally speaking, it does not devolve upon the principal to make inquiries as to the facts. He has a right to presume that his agent has followed instructions, and has not exceeded his authority. Whenever he is sought to be held liable on the ground of ratification, either express or implied, it must be shown that he ratified upon full knowledge of all material facts, or that he was willfully ignorant, or purposely refrained from seeking information, or that he intended to adopt the unauthorized act at all events, under whatever circumstances."

In Mechem on Agency, section 129, the doctrine is stated as follows:

"It may therefore be stated as the general rule, that, except in those cases where the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have, any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him."

It must not be overlooked that in this case no harm could come to anybody from the failure of the Wells Company to act, even though the company had been fully apprised of the facts. On February 2, 1901, when it is claimed that Wells gave them notice, he had *already and more than a month*

prior thereto used the funds in paying the subscriptions to the stock. If the Wells Company had at that stage found out the facts, and had repudiated the transaction, the case would not have stood in any different shape from what it does at this very time. No rights of third parties have intervened and nobody has been prejudiced by the fact that no action has been taken by the Wells Company, even conceding that it knew all about the transaction.

Fifth Proposition: Any notice which W. L. Wells may have had of the transactions in question cannot be imputed to the Wells Company, because W. L. Wells was acting for himself in the matter in question.

We have already shown, in the statement of facts, that this contract was for the benefit of W. L. Wells individually. It contemplated that the Wells Company should be displaced and that W. L. Wells individually should supply the defendant and the Loray mills with cotton. The very fact that the parties determined to keep it from the Wells Company is sufficient proof that it was not for the benefit of that company.

Besides this, it is a singular contention that notice to W. L. Wells was notice to the Wells Company, although Wells and Love were endeavoring to keep the Wells Company from obtaining this notice.

If it be shown that W. L. Wells was acting either beyond the scope of his powers in making the contract or was acting for his individual benefit, then the law will not impute any knowledge which he may have had to the Wells Company. The notice which an agent has and which is imputed to his principal arises only when the knowledge is acquired by the agent while acting in the usual course of his employment and for the benefit not of himself, but of his principal

In American Surety Co. *vs.* Pauly, 170 U. S., 133, it is said:

"The presumption that the agent informed his principal of that which his duty and the interest of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

In Central Coal Company *vs.* Good & Co., 120 Fed., 793 (C. C. A.), the court says:

"Where an agent acts for himself in his own interest and against the interest of his principal without the latter's consent in a given negotiation or transaction, neither the notice nor the knowlege of the agent can be lawfully imputed to the principal." (The court cites a large number of authorities to sustain this position.)

Also in Bank *vs.* Thompson, 118 Fed., 798 (C. C. A.), there will be found an exhaustive discussion of the question and a review of the authorities.

To the same effect are:

Helms *vs.* Pabst Brewing Co., 57 Am. St. Rep., 899, and notes.

Distilled Spirits Cases, 20 Wal., 356.

Produce Co. *vs.* Biederbach, 58 N. E., 162.

Smith *vs.* Boyd, 62 S. W., 439.

Kenneth Ins. Co. *vs.* Bank, 70 S. W., 173 (Mo.).

Sixth Proposition: The alleged agreement could only have been ratified by the board of directors of the Wells Company.

This contract to invest $50,000—five times the authorized capital of the Wells Company—in the stock of the Loray mills was such an unusual and extraordinary contract that it could not be presumed to have been within the power of any agent or officer, and, conceding for the sake of the argument that the corporation could have made such a contract, certainly it could have been made only by deliberate *corporate* action. By the same token, if ratified, it must have been ratified by a *corporate* act, as it is a rule stated in Marsh *vs.* Fulton County, 10 Wall, 676:

"*That a ratification can only be made when the party ratifying possesses the power to perform the act ratified.*"

In the case at bar nothing short of positive affirmative action on the part of the corporation could have ratified this unusual and extraordinary transaction.

In Western National Bank *vs.* Armstrong, 152 U. S., 346, speaking of the power of a national bank to borrow money, and of the authority of the vice-president, and of the alleged ratification of the act, says:

"Nor do we doubt that a bank in certain circumstances may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

"Even therefore if it be conceded that it was within the power of the board of directors of the Fidelity national bank to borrow $200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification to be efficacious must be made by a party who had power to do the act in the first place; that is in the present case, the board of directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity national bank, by any act, formal or informal, undertook to ratify Harper's actions in the premises, or that they ever had any knowledge of the transaction."

Seventh Proposition: The bringing of this suit to recover the purchase price of the cotton was not a ratification of the contract.

Counsel for defendant as a last resort have sought to make a great deal out of the fact that this is what they term "a suit upon a special contract," and it is argued that having brought this action upon a "special contract" the plaintiff is bound by all the terms of it, including the alleged agreement to allow the $50,000 due for cotton to be applied to W. L. Wells' stock subscription. This we submit is a technicality seven times refined.

At the outset of the discussion of this point we wish to emphasize again the fact that the contract between Wells and Love as alleged in the answer and as shown by the testimony are totally different. The answer alleged in effect that Love made it a condition precedent to the buying of cotton from the Wells Company that W. L. Wells should agree to allow the money that might become due for cotton to be invested in stock of the Loray mills to the amount of $50,000. The evidence, however, discloses that there never was any condition of this kind, and the evidence shows that the sale of cotton by the Wells Company was in no way con-

ditioned upon the alleged agreement. Not a bale of the cotton in controversy was sold by the Wells Company to the defendant in consideration of or as a result of the alleged agreement between W. L. Wells and John Love. The fact is that the contract had no relation whatever to a sale of cotton by the Wells Company. According to Love's own testimony there never was a suggestion that if W. L. Wells did not make the agreement in question, then the defendant would cease to buy cotton from the Wells Company. On the contrary, the sales were to go on just as before (p. 87). The real and only inducement or consideration was the one that Love held out to Wells (bottom of p. 66) that after the Loray mills was organized, then W. L. Wells should become the buyer for all the mills in the place of the Wells Company. So that the "special contract" taken in its most favorable light for the defendant amounted simply to this: Love agreed that if W. L. Wells would take stock in the Loray mills that W. L. Wells should become the vice-president of the Loray and buy cotton for the three mills, and W. L. Wells agreed on his part that Love might apply the purchase-money of cotton that was sold in the meantime by the Wells Company to Love's mills in satisfaction of this subscription of W. L. Wells; but it was nowhere stated or suggested that in consideration of this agreement the Wells Company would continue to sell cotton to Love's mills. In other words, the agreement between John Love and W. L. Wells did not cause the Wells Company to sell a single bale of cotton to the defendant. All of the cotton in question was sold at various times and under separate specific contracts, and yet it is now gravely argued that when the Wells Company brings a suit for the recovery of money due for this cotton it ratifies the collateral and unlawful agreement which it is claimed that W. L. Wells made, whereby the funds of the company were to be diverted in paying his individual debt.

But taking the contract as contended for by the defendant

there are several reasons why this suit did not amount to ratification.

(1.) In the first place, if the plaintiff has set out any "special contract" it has been admitted in the answer. Paragraph 2 of the plaintiff's complaint (p. 3) alleges that "the plaintiff sold and delivered to the defendant twenty-four hundred and eighty-three bales of cotton, for which the defendant agreed to pay the plaintiff $111,365.59, together with six per cent. interest after thirty days from the date of each invoice of cotton so delivered, a detailed statement showing the date of each invoice, the number of bales of cotton and the amounts due thereon, is set forth in the exhibit herewith filed, marked Exhibit A." On page 5 "Exhibit A" will be found, showing the number of bales and the prices at which it was sold. The defendant does not deny a single one of these allegations, as will appear by reference to the second paragraph of its answer (p. 7).

The Code of North Carolina, section 243, is a follows:

"The answer of the defendant must contain a general or specific denial of each material allegation of the complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief."

And section 268 is as follows:

"Every material allegation of the complaint not controverted by the answer * * * shall for the purposes of the action be taken as true."

This statute has been construed in a number of cases, which will be found collated on page 288 of the third edition of Clark's Code of Civil Procedure. Among these we refer to Bonham *vs.* Craig, 80 N. C., 224; Stephenson *vs.* Felton, 106 N. C., 114; Harris *vs.* Sneeden, 104 N. C., 369.

It will appear, then, that the "special contract" which the plaintiff sued upon was a promise on the part of the defend

ant to pay the plaintiff not in an investment of its money in stock of the Loray mills, but, in the language of the complaint, the defendant agreed "to pay the plaintiff the sum of $111,365.59," and the answer did not deny this, and according to the provisions of the North Carolina Code, above cited, and the decisions of the North Carolina Supreme Court, this allegation was admitted by the defendant; so that if this is treated as a suit upon a "special contract" at all, the "special contract" was as set out in the complaint, viz., a promise to pay the plaintiff *in money* for the cotton sold.

(2.) It will be noted also that in the complaint the plaintiff alleges sales by invoices under several contracts extending through several months, and the answer admits these several contracts (pp. 3–7). It would seem from these allegations and admissions that the "special contracts" sued on were the contracts made at the time the invoices were sent out.

(3.) But, turning to the correspondence showing exactly what did occur in writing, thus constituting the *written contract* between the parties as to how the cotton should be paid for, *there is left no room for doubt but that there was an express written contract on the part of the defendant, through its agent Love, to pay for the cotton bought from the Wells Company.*

As an example taken from dealings during the season of 1899–1900, we refer to the letter of Wells Company to Love, November 8, 1899 (p. 114), in which they distinctly ask payment in money and to which he replies, on November 10 (p. 115):

"Buy our cotton as soon as possible and we will make arrangements about money and think we can get all we want at any time. Buy cotton and send us invoices and letters telling us what you are doing and expect to do and we will make our arrangements accordingly."

Here was a distinct promise on the part of the defendant, through Love, to pay for the cotton in money to the plaintiff just as the plaintiff might demand it, and the further correspondence during the season of 1899–1900 shows demands for remittances and payments by the defendant, with never a suggestion that there was any "special contract" whereby the money due for cotton was to be turned over in payment of the stock subscription of the Loray mills.

Again, for the season of 1900–1901 we find likewise promises on the part of the defendant to pay the plaintiff in money. Take, for example, the letter of Wells to Love, October 5, 1900 (p. 126), in which Wells writes:

"By the way, when there we failed to talk anything about how you wanted to pay for this season's purchases. Some time last spring you wrote that you were going to arrange with the National Surety Company of New York for your cotton this season. Please let us know about this and oblige."

To this Love replied on October 9, 1900 (p. 127):

"As to payments on cotton we wish to remit you promptly for our immediate wants and we are making arrangements with the National Surety Company to get the money when we commence storing cotton."

Here is a "special contract" as clear-cut as any lawyer could draw it and a distinct promise to pay the money.

Following this we find that on October 20, 1900, the Wells Company wrote Love (p. 127), inclosing invoice and saying:

"We are billing you this cotton at same price we are to others on whom we draw with B. L. attached, and we will thank you to remit us promptly else we will make actual loss on it."

It is now contended that this very invoice contained in this letter was sold under an agreement whereby a part of the proceeds were to be applied upon the stock subscription of W. L. Wells!

Again, Wells wrote Love on October 31, 1900, stating that he was shipping one hundred and fifty bales and saying:

"I suppose you will want us to carry this cotton until it arrives when you will reimburse us through your arrangements with the National Surety Company. Please let us know definitely about this that we know just what to say to our bank about it."

To this Love replied on November 3, 1900 (p. 130):

"We are arranging with the National Surety Company to get all the money you want and as you suggest you can arrange with your bank accordingly."

It is now contended in regard to this shipment that it was sold under a "special contract," whereby a part of the money due for it might be applied on the stock subscription of W. L. Wells, and that the plaintiff, by suing for the purchase-money of this cotton, sold under a distinct promise to pay the money, thereby ratified some prior indefinite agreement between W. L. Wells and John Love.

But most of the cotton that is in controversy in this action was bought under the order of John Love as result of the telegram of November 12, 1900 (p. 131), in which Love requested Wells to buy four or five hundred bales. These constitute the greater part of the invoices which have not yet been settled, and it is material to know what the "special contract" was under which this cotton was bought. We find this "special contract" contained in a letter from the Wells Company to Love, November 30, 1900, stating that they had bought the large lot of cotton desired, and then saying:

"Hope you have perfected your arrangements with the National Company and will be able to remit us promptly as the cotton is received, as it runs into money at a terrible rate, and it does not take long to get in very bad shape with our bank."

Here was a distinct stipulation in the contract that the actual money for the cotton was to be remitted as the cotton was received, and to this Love replied on November 17, 1900 (p. 132):

"On money matters we have perfected our arrangements and we are looking for a check today but it has failed to come and we expect it now the first of the week when we will make you a good remittance."

These two letters constitute the *written special contract* between the parties as to most of the invoices which were not settled, and we submit that it cannot be seriously argued that the plaintiff by suing for the purchase price of this cotton, sold under the terms set forth in these letters, is thereby ratifying the previous indefinite agreement between Love and Wells, as testified to by Love. If there ever was any such verbal agreement, then certainly it was revoked and annulled by this "special contract" in writing contained in these letters.

(4.) Apart from all this there is not a line of testimony that shows that when the Wells Company brought this action it had that knowledge of the nature of the contract between Love and Wells which was necessary before the bringing of the suit could be from any standpoint considered as a ratification. No lawyer will deny but that it was incumbent upon the defendant to show that at the time the plaintiff brought this action the plaintiff had full knowledge of all the terms of the alleged agreement between Love and Wells. It is not pretended that Love communicated the terms of this agreement to the plaintiff, but, on the contrary, he expressly admits that it was understood between him and Wells that it should be concealed from the plaintiff, and in pursuance of that agreement he marked all letters "Personal," which might otherwise have given the Wells Company some information. How, then, can it be gravely argued that the

company brought this suit upon the contract, of which the alleged agreement between Wells and Love was a part, when there is not a line of the testimony which shows that this vicious element of the contract was known to the plaintiff?

We have not overlooked the testimony of Love to the effect that, shortly prior to the commencement of this action, he said something to the plaintiff's attorney in regard to claiming the $50,000 credit, but it certainly could not be reasonably contended that this gave the plaintiff full notice of all the terms of the alleged agreement between John Love and W. L. Wells. So far as this testimony goes, it only discloses the fact that John Love was setting up some sort of claim, the nature of which was not fully explained, and the burden was certainly upon the defendant to show that the plaintiff had full knowledge of all the terms of the alleged agreement between John Love and W. L. Wells, including not only the agreement that the money due for cotton might be applied to W. L. Wells' subscription to stock, but also that the contract contemplated that W. L. Wells should supplant the Wells Company as purchasing agent for the three mills controlled by John Love.

For an authority directly in point upon this proposition we refer the court to Mechem on Agency, section 129, where it is said :

"Any ratification of an unauthorized contract in order to be made effectual and obligatory upon the alleged principal must be shown to have been made by him with full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and *its nature and consideration were known to him.*"

In Trustees *vs.* Bowman, 136 N. Y., 526 (32 N. E., 988), the court said :

"But before a principal can be held to have ratified the unauthorized act of an assumed agent, he must have full

knowledge of the facts, so that it can be said that he intended to ratify the act. If his knowledge is partial or imperfect, he will not be held to have ratified the unauthorized act, and the proof of adequate knowledge of the facts should be reasonably clear and certain."

Under these authorities it was the duty of respondent to show that the Wells Company knew all the terms of the contract before any act on its part could constitute ratification, and it must be admitted that there is not a scintilla of evidence tending to show that John Love at any time before the commencement of this action gave the Wells Company information as to the nature and terms of its alleged agreement with W. L. Wells.

(5.) But conceding that the plaintiff brought this action with full knowledge of all the terms of the alleged agreement, and passing by the point that the cotton in question had already been used by the defendant and could not be recovered, we submit that the bringing of the action by the Wells Company for the purchase price agreed upon could not be held to ratify that part of the contract which was for the benefit of W. L. Wells individually, because with reference to this part of the contract it must be admitted that it was not made for or on behalf of the Wells Company, but for and on behalf of W. L. Wells individually.

We are not now controverting the proposition of law which holds that where a principal ratifies an act of his agent he ratifies it *in toto* and that he cannot accept that part which is beneficial to him and reject the part which is detrimental. These are rudimentary principles which cannot be contested. The case at bar, however, presents a very different phase of the question. It is sought by the defendant to establish the principle that where an agent sells the property of his principal for a fair and reasonable price and makes as a part of the contract a stipulation that his principal's money shall be applied to the payment of the agent's

individual obligation, that the principal cannot sue for the purchase-money without ratifying that part of the agreement which provided that the principal's money should be applied to the agent's individual debt. We submit that no authority can be found to sustain this proposition and for the very plain reason that so much of the contract as provided for the appropriation of the principal's money to the agent's private debt was not made on behalf of, nor for the benefit of, the company and was a stipulation which the party dealing with the agent was bound to have known did not bind the principal.

The only authority cited by the respondent upon this point is that of Shoninger *vs.* Peabody, 14 Amr. St. R., 88 (Conn.), but an examination of the concluding part of the opinion in that case will show that on the very point under discussed here the court sustained the view which we now seek to maintain. In that case the supreme court of Connecticut discussed a Vermont case which apparently conflicted with the ruling of the Connecticut court, and in its effort to reconcile the two opinions the court said:

"In regard, however, to the question whether the suit would be effectual as a ratification of their agent's act, we suggest this distinction: that the act of the agent in paying his private debt with the plaintiff's goods could not, perhaps, be regarded as an act done for or in behalf of the principals at all, nor even in the principals' name, and was not properly a contract of sale at all, so that there was no express contract to be affirmed by the bringing of the suit, and nothing to prevent the raising of the implied promise except the fact that the defendant had not sold the goods and received money thereon. It is undoubtedly a sound doctrine, established by numerous authorities, that to make a ratification effectual it must be of some act done or engagement made as agent for or on behalf of the person whom it is alleged to bind."

Here, from the leading and practically only authority cited by the respondent, we find a clear statement of the rule of

law applicable to our case, and under this decision it is plain that the agreement by which the Wells Company's money was to be applied in payment of the stock subscription of W. L. Wells, coupled with the inducement held out by John Love, according to his own testimony (R., bottom of p. 66), that W. L. Wells was to supplant the Wells Company as purchasing agent of the three mills, could not be held to be an agreement made for or on behalf of the Wells Company, and therefore the suing for the purchase-money could not in any sense ratify this part of the agreement.

In connection with this case of Shoninger *vs.* Peabody, relied upon by respondent, we wish to call the attention of the court to the second opinion of the supreme court of Connecticut when the case went back to that court. It will be found reported in 59 Conn., 588, and the second opinion shows what explanation the court gave of its former ruling, and, we submit, it adds strength to our argument. In addition to that, we refer to the case of Stewart *vs.* Woodard, 50 Vt., 78 (28 Am. Rep., 488), in which plaintiff sued the defendant for the price of a suit of clothes, and the defendant plead that the agent of the plaintiff had agreed that the price of the suit might be applied in payment of the agent's medical bill. The court said:

"The defendant purchased the goods sued for and attempted a mode of payment which he was bound to know was unauthorized. He has had the goods and converted them to his own use, never having paid the plaintiffs for them. The implied promise arising from taking the benefit of the delivery of them is sufficient to warrant recovery in this action."

And in Gould *vs.* Blodgett, 61 N. H., 115, it was held that an action of assumpsit against a person for whom the agent has delivered his principal's property in payment of his own debt is not a ratification of the unauthorized delivery.

(6.) But conceding everything claimed by the defendant with regard to the bringing of this suit upon the "special contract," it still remains that the suit was no ratification of the unlawful agreement between Love and W. L. Wells, because at the time that this was found out the cotton had already been used by the defendant, and the Wells Company could not have repudiated the contract and saved itself whole. The defendant admits in its answer that the cotton was bought at the prices claimed in the complaint. This cotton has been consumed in the mills of the defendant. The plaintiff did not know of the unlawful and wrongful contract made between Love and W. L. Wells until after the cotton had been used. What could the plaintiff do except to sue for the purchase price of the cotton about which there is no dispute? There was no other alternative except to abandon its claim. The doctrine of ratification presupposes that the principal has his election either to ratify or disaffirm the contract of the agent and at the same time save himself whole.

This contention of the defendant is but a part of the position taken by the defendant that the receipt and retention of benefits under a contract ratifies it, and we shall presently cite numerous authorities showing that this principle of law does not apply to the proposition that we are here discussing. We refer the court to a case which is directly in point. In Cooley *vs.* Perrine, 12 Vroom, 322 (32 Am. Rep., 210), plaintiff brought a suit upon a note given for a horse and the defendant pleaded that the plaintiff's agent had made a contract of warranty and claimed damages for breach of the warranty. The plaintiff denied the authority of his agent to make the warranty, and the defendant contended there, just as in the case at bar, that the bringing of the suit upon the note ratified the act of the agent. In the meantime the horse had died, and this, of course, prevented the plaintiff from rescinding the contract. In the course of the able opinion the court says :

"Sometimes it has been intimated that a distinction might be based upon whether the warranty by the agent were set up by a plaintiff to maintain a suit against the principal, or by a defendant to resist the principal's suit for the price, and that the attempt of the principal to collect the price, after he has learned of the warranty, is a ratification of it. On the idea that the authority does not cover the warranty, and that the purchaser is chargeable with knowledge of the authority, it is not plain how he can withstand the vendor's claim on a contract made, by alleging a contract which he knew was not made. But if there be anything at all in the distinction, it must be confined to those cases where, when the principal obtains knowledge of his agent's unauthorized warranty, the sale is *in fieri*, or can be declared void and the parties restored to their original position. What the principal does in pursuance of a bargain which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract (Coombs *v.* Scott, 12 Allen, 493; Smith *v.* Tracy, 36 N. Y., 79; Titus *v.* Phillips, 3 C. E. Green, 541; Gulick *v.* Grover, 4 Vroom, 463). *And if, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser, who dealt with a special agent without noting the bounds of his power, must suffer rather than the innocent principal.* (Bryant *v.* Moore, 26 Me., 84). These views are not at all in conflict with the class of cases which hold that the principal is responsible for the fraud or deceit of his agent, committed in the course of his employment, for his employer's benefit."

We also refer the court to the cases cited under the next succeeding proposition as being directly in line with foregoing authorities.

Eighth Proposition: Conceding that the Wells Company obtained benefits from the alleged agreement and retained these benefits after knowledge of the contract, this retention of benefits would not amount to a ratification under the circumstances of this case.

We submit that it is too plain for discussion that the Wells Company received no benefits from the alleged agreement between W. L. Wells and John F. Love. We have endeavored in a former part of this brief to point out the fact that not a bale of the cotton in controversy was sold as a result of or in consideration of the making of the agreement between Love and W. L. Wells. Love nowhere states in his testimony that he purchased this cotton now in controversy in consequence of the agreement between Wells and himself. In truth, the undisputed facts show that the alleged agreement instead of being a benefit to the Wells Company was intended to take away from it the right to sell cotton to Love's mills, because it contemplated that W. L. Wells individually should buy the cotton for the mills. Conceding, however, that the Wells Company received benefits from the contract, we submit that this retention of benefits did not ratify the alleged unlawful agreement between Love and W. L. Wells whereby the money of the Wells Company should be taken to pay the individual debt of W. L. Wells.

(1.) If any benefits were received by the Wells Company from the contract the evidence all shows that at the time the benefits were received the company was in absolute ignorance of the illegal part of the agreement, viz., that part of the contract which permitted the money of the Wells Company to be applied to W. L. Wells' individual debt. Love was bound to have known that this was an unlawful agreement and one that W. L. Wells had no power to make. Therefore it does not lie in his mouth to say that the Wells Company cannot repudiate that part of the agreement which

he had no right to rely upon, and which he was bound to know the Wells Company was ignorant of. This doctrine is tersely stated in the case of Bloomfield *vs.* Charter Oak Bank, 121 U. S., 138, as follows:

"Any ratification of an act previously unauthorized, must in order to bind the principal be with full knowledge of all material facts and no estoppel *in pais* can be created, except by conduct which the person setting up the estoppel *has the right to rely upon*, and does in fact rely and act upon."

Every essential principle announced in the decision just quoted is present in the case at bar. The Wells Company did not have full knowledge, and Love had no right to rely upon the alleged unlawful agreement.

In Bell *vs.* Cunningham, 3 Pet., 69, this court held that the retention of benefits by a principal would not ratify the acts of the agent unless the principal had full knowledge of the terms of the contract.

A very full and exhaustive discussion of this question will be found in the leading case of Smith *vs.* Tracy, 36 N. Y., 79, where the court says:

"When a party claims, receives and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency, which evinces his assent to the contract or the wrong. The courts, however, have been careful in the leading cases of that class, to note, as the precise ground of legal liability, the knowledge of the facts by the party appropriating the benefit (Murray *v.* Binninger, 36 N. Y., 61; Fitzhugh *v.* Sackett, *id.*; Bank of Beloit *v.* Beale, 34 *id.*, 473, 475; Keeler *v.* Salisbury, 33 *id.*, 653; Farmers' Loan & Trust Co. *v.* Walworth, 1 *id.*, 446; Palmerston *v.* Huxford, 4 Denio, 166, 168). So, when a party takes the benefit of an unauthorized loan or purchase, obtained on his credit by his known servant or employee, it is held that his subsequent adoption of the transaction is equivalent to an original authority (Bolton *v.* Hillersden, 1 Ld. Raym., 224; Precious *v.* Abel, 1 Esq., 350; Rimell *v.* Sarpayo, 1 Carr & Payne, 254). The cases on which the respondent mainly relies, are those

in which it has been held, that when an authorized agent, *acting within the scope of his authority*, perpetrates a fraud, for the benefit of his principal, and the latter receives the fruits of it, he is liable for his own wrong (Bennett, Judson, 21 N. Y., 238; Elwell *v.* Chamberlain, 31 *id.*, 611). These authorities rest upon the principle, that when a party clothes another with authority to speak in his behalf, and indorses him to the third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit, which he seeks to turn to his profit was practiced by him or by his accredited agent. In such a case, he cannot separate the legal from the illegal elements of the contract, and appropriate the advatages it secures, while he rejects the corrupt instrumentalities by which they were obtained. But when, as in the present case, there is a mere special authority to sell particular property, of a kind not usually sold with warranty, the buyer, who alleges a warranty by the agent, must show that the engagement was one he was empowered to make in behalf of his principal. The receipt of the proceeds of the sale, in ignorance of any such undertaking, is neither an assent to the breach of duty nor an extension of the authority of the agent. The question is one as to the existence and extent of the power, and not as to a fraud practiced by an agent acting within the scope of his authority. * * * In the case before us, it is claimed that the receipt by the testator of the proceeds of an authorized sale, is to be deemed an adoption of a contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well-settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys and others, clothed with limited powers and occupying strictly fiduciary relations (Owings *v.* Hull, 9 Peters, 608, 629; Bell *v.* Cunningham, 3 *id.*, 69, 76, 81; Brady *v.* Todd, 99 Eng. Com. Law, 591, 601, 605; Freeman *v.* Rosher, 66 *id.*, 787; Seymour *v.* Wyckoff, 10 N. Y., 213). In the language of Judge Story, in the first of these cases, 'No doctrine is better settled, both upon principle and authority, than this; that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts.'"

Also in the case of Baldwin *vs.* Burrows, 47 N. Y., 199, the same learned court, after adverting to the well-established doctrine that a principal "by adopting a contract made for him and receiving and retaining the fruits as belonging to him by virtue of that contract, assumes responsibilities for the instrumentalities which the agent may have employed in his behalf to effect the contract," then draws this well-defined distinction:

"It must be observed, however, that even this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contracts may have been the means by which the agent was enabled to effect the authorized contract, and the principal retain the proceeds thereof after knowledge of the fact (Smith *v.* Tracy, 36 N. Y., 79; and see Hammond *v.* Michigan State Bank, Walker's Ch. R., 214; Young *v.* White, 7 Beav., 506). A party dealing with an agent is bound to inquire as to the extent of his authority; but he cannot always protect himself against his frauds. The cases in which it is held that, if the principal ratifies and enjoys the benefit of part of a contract, he cannot repudiate the rest, refer to an intentional ratification with knowledge of all that has been done."

In Wheeler *vs.* Northwestern Sleigh Co., 39 Fed., 347, the agent of the plaintiff had sold certain stock which belonged to the plaintiff, and had made an unauthorized stipulation as a part of the contract of sale that the accrued dividends should pass to the purchaser. The court said:

"Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of his stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other property than the stock as the consideration for the money paid by the purchasers and received by him. Under such circumstances, the retention of the money cannot be held to be

a ratification by him of the unauthorized acts of the agent, because it was retained without knowledge of the facts. * * * The purchaser was bound to inquire into the authority of the agent in such case. The reception and retention of the exact sum authorized to be taken for the house, in ignorance of the act of the agent with respect to the bank stock, is no ratification. Otherwise the principal is bound for every unauthorized act of the agent, and the purchaser may trust the agent, who can exhibit no authority. Such a principle would be ruinous."

In Roberts *vs.* Rumley, 58 Iowa, 301 (12 Northwestern, 323), discussing the very point in controversy, the court says:

"It is further claimed that the defendants cannot avail themselves of the benefits of the acts of their agents without also being bound by whatever may be prejudicial to them. This principle applies to the doctrine of agency, with some limitations and qualifications. If the agents had incorporated in the mortgage a provision that the proceeds of the mortgaged property should first be applied to the satisfaction of the judgment upon which Roberts was surety, the defendants could not have accepted the benefits of the mortgage without being bound by this condition, even although the agents had no authority to agree to such condition. So, too, if the defendants had known that their agents had agreed to incorporate such a condition in the mortgage, and that it was omitted by mistake, they would, probably, on acceptance of the mortgage, have been bound by the condition. But to hold that the principal is bound by agreements between the special agent and the person with whom he contracts, not authorized by the agent's appointment, and of which he had no knowledge when he accepted the benefits of the contract, would be entirely subversive of the whole doctrine of special agency, and instead of requiring the person dealing with the agent to ascertain at his peril that the agent has kept within his special authority, would require the principal to inquire at his peril whether the agent had gone beyond it."

For another able opinion, in which the authorities are reviewed, we refer to the case of Nichols *vs.* Bruns, 4 Dak., 34 (37 N. W., 752).

(2.) But the retention of benefits by the Wells Company (if any there were) under the circumstances of this case could not in any event be taken as a ratification for the reason that at the time that the company was informed of the vicious or unlawful element in the alleged contract it could not surrender the benefits that it had received and at the same time save itself harmless. The Wells Company could not repudiate the transaction and recover back its cotton, because it had already been used in the mills of the defendant, and there was nothing else that the company could do except to claim the purchase-money which the defendant had agreed to pay. Under these circumstances the Wells Company had the right to repudiate that part of the agreement which was unauthorized and stand upon the valid terms of the contract, because if any loss is to be suffered it must be suffered by the party who dealt with the agent, knowing that he was transcending his authority. The following cases abundantly sustain the position which we have taken:

In Bryant *vs.* Moore, 45 Am. Dec., 96, it is said:

"There is no doubt that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it. This will not be the case, when the knowledge that the person has exceeded his authority is not received by the employer so early as to enable him, before a material change of circumstances, to repudiate the whole transaction without essential injury. If, for instance, a merchant should authorize a broker by a written memorandum to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet exceed the price, and this should be made known to the merchant when he received the goods; if he should retain or sell them, he would ratify the bargain made by the broker, and be obliged to pay the agreed price. But if he had received the goods without knowledge that they had been purchased at an advanced price, he would not be obliged to restore them, or pay such advanced price, if he

could not, when informed of it, repudiate the bargain without suffering loss. In such case he would not be in fault. The seller would be, and he should bear the loss."

In Cooley *vs.* Perrine, 32 Am. Rep., 210, it is said:

"What the principal does in pursuance of a bargain which he had authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract. And if, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser, who dealt with a special agent without noting the bounds of his power, must suffer rather than the innocent principal."

In Martin *vs.* Hickman, 41 S. W., 852, the court said:

"The principal will not be considered as having ratified an unauthorized act of his agent merely because he receives property and avails himself of the advantages derived from such act, when he did not learn that such agent had exceeded his authority until after he had sold the property, and after the circumstances were such as to put it beyond his power to return or restore the property. * * * Martin could not restore the property, for he had already sold it before learning of the unauthorized act of his agent, Clary. His failure to restore or return the property under such circumstances cannot be treated as a ratification, so as to make him liable for the unauthorized promise of Clary. The evidence on this point was not sufficient to sustain the verdict."

In Swayne *vs.* Ins. Co., 49 S. W., 518, it is said:

"Nor can it be said under the circumstances that the company would be bound on account of the alleged ratification in accepting the benefits of the service rendered by appellant. It was not within its power, after the service had been rendered, to reject such benefits. Ratification as a result of taking the benefits of an unauthorized transaction implies the power of election to take or not to take; that is to say, when the principal discovers that the agent has exceeded his authority, he cannot then, without being bound, hold on to

benefits derived from the unauthorized transaction, when it is within his power, by a repudiation of the unauthorized act, to restore such benefits to the one from whom they have been acquired."

Ninth Proposition: The undisputed evidence shows that there was no actual ratification by the Wells Company; and whatever inferences of ratification might have been drawn from the failure of the Wells Company to demand money were fully explained and rebutted by the direct, positive, and uncontradicted testimony of J. T. Wells, and in this state of the evidence it was the duty of the circuit judge to direct a verdict for plaintiff.

It will be noted that the sole ground upon which the defendant's counsel claim that this case should have gone to the jury is that after the Wells Company received the letter of the 31st of August, 1900, containing the endorsement ("Loray Mill stock $10,000—we want to see your Mr. Wells about it") the company did not thereafter make demand for this specific sum, and, further, that after the letter which Love wrote to W. L. Wells of February 2, 1901, informing W. L. Wells that he had paid in his $50,000 and requesting him to have the Wells Company credit Love's house with that amount there was no demand for several months. We have already discussed these facts fully in the foregoing part of the brief and desire now merely to call attention to certain authorities bearing directly upon them.

The question before Judge Boyd was whether there was any evidence of ratification sufficient to warrant the jury in so finding. The defendant relied solely upon *inferences* to be drawn from a failure on the part of the plaintiff to make demand. The defendant does not contend that this neglect or failure to demand payment was in itself a ratification, but

the contention is that the jury would have been warranted in drawing the *inference* from this fact that the plaintiff had actually with knowledge ratified the transaction. Over against this inference, taken in its strongest light for the defendant, we have *the clear, convincing, uncontradicted testimony of John T. Wells* to the effect that the company did *not* have knowledge of the transaction and did *not* ratify it. The question, then; was whether the judge below should have allowed the jury to find from mere *presumption* or *inferences* that a certain fact existed when the *clear and uncontradicted* testimony of a credible witness showed conclusively that it did not exist. The authorities are conclusive.

In case of Fresh *vs.* Gilson, 16 Pet., 327, the plaintiff contracted with the defendants to build a culvert on a canal for a stipulated sum. Afterwards the plaintiff sublet all or a part of the work to one Barret. After the work was finished the plaintiff brought suit against the defendants upon the contract and the defendants offered to prove and the judge in the circuit court allowed them to prove that they had paid certain orders drawn on them by the subcontractor, Barret, and the jury was allowed to find these as a credit in favor of defendants against the plaintiff. It seems that it was shown in evidence that in several statements of account that had passed between the plaintiff and defendants, orders which Barret had drawn upon the defendants were allowed and from this fact the defendants argued that there was a *presumption* or that the jury might be entitled to draw the *inference* that the defendants had authorized Barret. There was, however, direct and positive proof that the plaintiff had never authorized Barret to draw orders on his account, and the question before the court was whether the *presumption* or *inference* from the conduct of the parties rendered these orders drawn by Barret competent evidence to go to the jury in the face of the *positive proof to the contrary*. The Circuit Court allowed the evidence to go to the jury, but the

Supreme Court reversed this ruling and in the course of the opinion said:

"We are unable to perceive upon what correct legal principle this question was ruled as it has been by the Circuit Court. There is no express power apparent in the record; nor indeed was any attempted to be shown in the proofs, existing in Barret, to bind Fresh for any amount with any person. * * * Nor is it perceived that the admission of these orders was warranted by any presumption arising from the fact that orders previously drawn by the same person were comprised in the account proved to have been presented by Fresh, and not objected to by him, except as to the quantity of cement charged therein. Liability for the acts of others may be created either by a direct authority given for their performance, or it may flow from their adoption, or, in some instances, from acquiescence in those acts. *But presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them; and still more must give place when in conflict with* CLEAR, DISTINCT, AND CONVINCING PROOF." (Italics ours.)

But we submit for the consideration of the court a case directly in point and presenting even a stronger phase of the question than that afforded by the case at bar. We refer to Hurley *vs.* Watson, 68 Mich., 532 (36 N. W. Rep., 726). In this case the plaintiffs were dealers in coal, and had an employee, one Clark, who appears to have occupied the position of general manager, selling coal, making settlements, and making entries in plaintiffs' books. The defendant owned a drug store and certain houses, which he rented. The plaintiffs' agent, Clark, sold the defendant coal for six or seven years and credited the account of the books with the amount of house rent and the drug bill due from the agent to the defendant. After the agent left the employment of the plaintiffs they discovered what had been done and brought suit against the defendant for the entire amount of coal that had been sold during the six or seven years, although the books had been balanced from time to time, and the books showed only a small amount due. The plaintiffs testified

positively that they had not authorized their agent, Clark, to pay his individual drug bill and house rent out of the money due them by defendant for coal. The defendant contended that from the course of dealings that had been going on and the entries in the books of the plaintiffs and the long time that the transactions had been continued the jury were warranted in drawing the inference that the plaintiffs had either authorized it or ratified it, and that the jury should be allowed to find this fact, notwithstanding the clear and uncontradicted testimony of the plaintiffs that they had not authorized it and had not ratified it. Under this state of the evidence the plaintiffs' counsel requested the judge who tried the case to direct a verdict for the plaintiffs, but he refused to do so and left the matter to the jury to say whether the direct testimony of the plaintiffs or the inference and presumption to be drawn from the facts should prevail. *On appeal the Supreme Court of Michigan held that the judge below erred, and that he should have directed a verdict for the plaintiffs.* The case covers every point in the case at bar so completely that we give here a full extract from the opinion:

"The law is well settled that a person who deals with an agent is bound to inquire into his authority, and ignorance of the agent's authority is no excuse. The authority of an agent to collect money for his principal does not authorize him to receive anything but money in payment from the debtor. The principal may be careless in reposing confidence in his agent, yet this does not make him liable to a third party, who, in dealing with such agent, fails to exercise the diligence usual with good business men under the circumstances. If there is anything likely to put a reasonable business man upon his guard as to the authority of the agent, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitation. As illustrated by Mr. Wharton, in his work on Agency, § 137, wherein he says: 'I may be careless in exhibiting confidence in an agent, yet this does not make me liable to a third party, who, in dealing with such agent, fails to apply the diligence usual with good business men under the circumstances. The case becomes in such a view one of what is

called "contributory negligence;" in other words, the casual connection between my negligence in giving color to the employment of A., and B.'s loss by dealing with A., is broken by B.'s own negligence in trusting A. without due inquiry.' The duty of the defendant to make inquiry in this case, notwithstanding the apparent general management of plaintiffs' business by Clark, is conclusively established by another well-recognized principle of law, and that is that a party dealing with an agent who has general authority to sell goods or collect debts, is bound to know that the agent has no authority by virtue of his agency to apply or offset his own private debt to such third party in payment of the debt to the principal. (Cases cited.) No overweening confidence of the principal in the agent can excuse the duty of the third party to ascertain whether the agent has authority from his principal to pay the agent's debts in that way. It is presumptively a violation of the agent's authority, and a fraud upon his principal, and the party collecting his debt from the agent in that way participates in the fraud, and cannot shield himself behind any presumed or implied authority of the agent, because none exists in such case. The party so dealing takes upon himself the burden of showing an express authority in the agent or ratification of the transaction by the principal. It is not pretended that there was any express authority given by plaintiffs to Clark to apply the rent and account due from him to defendant in payment for coal due from defendant to plaintiffs. There can be no ratification of an act of an agent without full knowledge of the facts which it is claimed are ratified. There was no evidence that plaintiffs ever had any knowledge of the dealings between defendant and Clark until after Clark left their employment. The first information the plaintiffs claim to have received was from defendant after the dealings in controversy had ceased. But it is claimed on behalf of defendant that plaintiffs must be held to have had knowledge of the contents of their books of account, and that the fact that those books contained an account with defendant for coal purchased from time to time from 1880, and credits therefor, so that a small balance only remains due to plaintiffs by said account, and the further fact that those books contain an account wherein Clark is charged with the amount collected of defendant, is evidence from which the jury may infer that the plaintiffs knew

of the manner of dealing between Clark and defendant, and, not objecting to such dealing, it may be further inferred that they intended to and did ratify the same. Both of the plaintiffs testified positively that they never knew that such accounts stood upon their books before Clark left, and that they had never examined their books of account. The circuit judge instructed the jury that 'Clark's position with the Hurleys, the dealings and settlements between Clark and Watson occurring as they did, the lapse of time ensuing without complaint or objection by the Hurleys, the dealings and settlements between Clark and Watson having been recorded, if you find that they were recorded, as they from time to time occurred in the regular book of the Hurleys, to which they could have full and daily access, and which were in ordinary use in their business, raises the presumption that the Hurleys knew and approved of said settlements. It is not conclusive, but it raises the presumption. You should take into account all the other testimony, and arrive at your own conclusion from the whole. The burden is upon the Hurleys to establish the invalidity of the dealing. The presumption that the Hurleys knew of and approved of the transaction between Clark and Watson is not rebutted by the assertion of the Hurleys that they knew nothing of them, if the jury are satisfied from the evidence that the Hurleys did not exercise reasonably prudent supervision or oversight over their business, and thereby failed to know or discover the course their own affairs were taking. You have heard all the facts, gentlemen. Counsel have embodied requests in writing, and I do not desire to comment upon the testimony. Take all the testimony in the case into consideration, Mr. Hurley's testimony regarding his knowledge of what was going on, and all the transactions and presumptions that he should have known, and, in the ordinary course of dealings, if you believe his books contained the record of them, all the facts and circumstances together, as I have expressed it, and give it that careful consideration which it deserves, and your verdict will no doubt be satisfactory.'

"If the plaintiffs knew of the manner of dealing between Clark and Hurley, and kept silent and suffered it to go on without objection for the length of time shown in the testimony, the jury would have been warranted in finding that they had ratified that course of dealing. But there must be

evidence tending to prove such knowledge. There is a presumption that a person is cognizant of the contents of his own books of account. The probative force, however, of this presumption may be strong or weak, as the circumstances may show that the party made the original entries, or that they were made by a clerk or book-keeper, and may be entirely overcome and disproved by the positive testimony of the party, uncontradicted, that the accounts were kept and entries made by a book-keeper or clerk, and had never been examined by him, and that he had no knowledge thereof. As was said by Mr. Justice Daniel, in Fresh *v.* Gobson, 16 Pet. 330: 'Liability for the acts of others may be created either by a direct authority given for their performance, or it may flow from their adoption, or, in some instances, from acquiescence in those acts. But presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them; and still more, must give place when in conflict with clear, distinct, and convincing proof.' The circuit judge erred when he instructed the jury that 'the burden is on the Hurleys to establish the invalidity of the dealing.' This is apparent from the principles above laid down relative to the duty of one dealing with an agent. He also erred in charging the jury that 'the presumption that the Hurleys knew of and approved the transaction between Clark and Watson is not rebutted by the assertion of the Hurleys that they knew nothing of them.' Under the circumstances of this case, there is no ground for saying that plaintiffs are estopped by their negligence in not exercising a more vigilant supervision and oversight over their business, and thereby failing to discover the course their own affairs were taking. Their negligence did not excuse defendant from ascertaining whether Clark was authorized to pay his own debts in the coal of plaintiffs, or justify the defendant in participating in so palpable a breach of duty on the part of the agent. The proofs show that plaintiffs knew that the defendant was dealing with them, but there is nothing to show they had any notice that such dealing was other than in the ordinary way. The proofs also established the fact that the plaintiffs paid their men regularly twice a month, including Clark. What, then, was there to raise a suspicion in their minds that Clark was charging coal sold to defendant to his own account upon the books of the plaintiffs? The burden of proof was

upon the defendant to show ratification; and generally it is a question for the jury whether silence affords a reasonable presumption of ratification under the circumstances of the particular case, and will depend very much upon the question whether the party dealing with the agent had reason, from the course of previous dealing, or from the circumstances of the case, including the fact that the principal had notice or knowledge of the assumed authority of the agent in the dealing, to suppose that the principal would inform the party if he intended not to ratify the act, and whether his delay and silence, after such notice or knowledge, are or are not a fraud upon the other party. In this case the record does not disclose in what manner defendant was defrauded by the silence of the plaintiffs even if it should be conceded that they had notice and said nothing. It is to be presumed that defendant bought no more coal than he needed for use. It is not shown that he paid a larger price for it because he could turn it upon account against Clark in the way he did. It does not appear that Clark has absconded, or that he was or is insolvent. Defendant testifies that he would as soon have paid the money for the coal, and offered to do so, but that Clark suggested to apply it upon rent due from him to defendant. If Clark had no authority to receive anything but cash in payment for coal sold to defendant, and defendant is now obliged to pay plaintiffs for such coal, Clark's debt to defendant is not discharged. He is still liable, and the defendant, so far as this record discloses, loses nothing. It is not like the cases where the principal has received a benefit from the transaction which he retains, and where he will not be permitted to repudiate the authority after accepting and retaining the benefit derived from the transaction."

As showing the striking parallel between the case above cited and the one at bar, we call attention to the fact that in our case the defendant Love still has his cause of action, if any, against W. L. Wells for the $50,000. It is shown from the evidence that W. L. Wells is abundantly solvent, and hence there can be no wrong done in relegating the defendant or its agent, Love, to an action against W. L. Wells to recover any amounts that may have been paid on his account.

Tenth Proposition: The diversion of $50,000 of the funds of the W. L. Wells Company in payment of subscription to stock in the Loray mills was ultra vires, whether the stock was intended for the W. L. Wells Company or for W. L. Wells individually.

In the previous discussion of the questions involved in this case we have, for the sake of the argument, taken it for granted that the alleged agreement relied upon by the defendant was one that the Wells Company, as a corporation, could have made. We submit, however, that it is susceptible of demonstration to the satisfaction of the court that the alleged agreement was *ultra vires* of the plaintiff corporation. Admitting that there was an agreement between Wells and Love to apply the purchase-money of cotton in payment of the stock of the Loray mills, and admitting that this agreement was not revoked by the subsequent letters and writings between them, we still maintain that such a contract is *ultra vires of* the W. L. Wells Company. This is true if the stock of the Loray mills was to become the property of the Wells Company, and for a stronger reason it is true if the agreement contemplated that the funds of the Wells Company to the amount of $50,000 should be diverted into paying W. L. Wells' individual subscription.

When is a contract *ultra vires* of a corporation?

It would only seem necessary to cite the opinion of Judge Simonton in Safety Wire Company *vs.* Mayer, 74 Fed. Rep., 363, quoting with approval Central Trans. Co. *vs.* Pullman Car Co., 139 U. S., 24, as follows:

"Upon the authority and duty of a corporation to exercise the powers granted it by the legislature and those only, and upon the invalidity of any contract made beyond their powers or providing for their disuse or alienation, there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered within the past twelve years by the late Mr. Justice Miller, afford satisfactory

guides and ample illustrations. After collaborating and discussing these cases, the general principle is stated that contracts of a corporation beyond the scope of powers enumerated in its charter (read in the light of any general laws which are applicable) and other powers not fairly incidental thereto, are unlawful and void."

In the recent and valuable work of Clark & Marshall on Corporations, vol. I, sec. 205, we find the following:

"When properly used, the words '*ultra vires*' as applied to the act of a corporation, mean simply an act which is beyond the powers (*ultra vires*) conferred upon the corporation by its charter, as distinguished from an act which is authorized by its charter. The act need not necessarily be expressly prohibited by the charter or by any other statute. Nor need it be in any sense immoral or injurious to others. It may be an act which could be lawfully done by a natural person. It may be even praiseworthy as in the case of a gift by a corporation for charitable or religious purposes. Yet, if it is not authorized by the corporation, it is *ultra vires*. In other words, an *ultra vires* act by a corporation, in the proper sense, is simply an unauthorized act."

In support of this definition this learned author cites with approval the case of Whitney Arms Co. *vs.* Barlow, 63 N. Y., 62; 20 Am. Rep., 504, in which is given a clear definition of an *ultra vires* contract as follows:

"When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created."

Now, let us consider the contract in the light in which it is treated by defendant. It is alleged in the answer of defendant that this contract contemplated that the stock in

the Loray mills should be taken for the benefit of W. L. Wells Company.

We understand it to be admitted by defendant that it is an *ultra vires* contract where one corporation deliberately invests its funds in the stock of another corporation; but it is contended that in this case the taking of the stock was merely *incidental* to the purchase of cotton. Let us see whether it was an *incidental transaction* or a deliberate *investment*. In defendant's answer (p. 8) it is alleged that it was agreed between Love and Wells that "a portion of the purchase-money due for the said cotton might be *invested in the stock of the said proposed manufacturing plant*, which was known as the Loray mills." There the defendant gives deliberately its understanding of the agreement, which was that this cotton money should be *invested* in the stock of the Loray mills. It would seem to be sufficient to stop with this statement because it clearly avers an investment and not an incidental transaction.

But apart from the answer it is a most astounding proposition that it is merely incidental to the business of a corporation for it to agree to accept $50,000 of stock of another corporation in payment of cotton sold—five times its capital stock invested in the stock of another corporation—and yet call this an *incidental transaction!*

In Cal. Nat. Bank *vs.* Kennedy, 167 U. S., 362, it was distinctly held that it was *ultra vires* of one corporation to purchase stock of another. In First Nat. Bank *vs.* Nat. Ex. Bank, 92 U. S., 123, speaking of the power of one corporation to take stock in another, the court says:

"Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in satisfaction with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss."

But as this is a Mississippi corporation, its powers are to be construed in the light of the laws of that State, and in Woodbury *vs.* McClurg, 78 Miss., 831 (29 So. Rep., 514), decided by the Supreme Court of Mississippi in March, 1901, we find the following:

"And a corporation created under chapter 25, Code 1892, can only exercise the powers prescribed by that chapter. By that chapter it is clear that every corporation is intended to be a separate and distinct entity, and reading, in the light of our statutes and the principles of common law relating to corporations, the first clause of section 5, chapter 88, Acts 1900 (the anti-trust law), we construe it to mean, as therein expressly declared, that *no corporation shall directly or indirectly purchase or own capital stock, or any part thereof, of any corporation; and that, too, without any question of competition between them.*"

It would seem plain, then, that whatever the law may be elsewhere with regard to this Mississippi corporation it must be assumed that any act on its part in attempting to procure the stock of another corporation was *ultra vires*.

In one of the cases above cited from the Supreme Court of the United States it is said that it is not *ultra vires* of one corporation to take the stock of another one in a *bona fide* effort to secure a debt and with a view to selling the stock. This is what the courts mean when they say that a corporation may take stock in another corporation whenever it is a mere "incident" in the regular course of business, but in the case at bar no one can contend that this transaction was merely an *incident* in the regular course of business. The contract, if made at all, was not made for the purpose of enabling the Wells Company to dispose of some property which it had on hand, but it referred to cotton that the Wells Company should thereafter purchase and sell to the defendant, and that, as the answer says, "a portion of the purchase-money due for the said cotton might be invested in the stock, etc."

If the Wells Company had agreed to invest a part of the money which it had on hand in purchasing stock from the Loray mills, in consideration that the Loray would allow the Wells Company to sell it cotton, this would be admittedly an *ultra vires contract*, but it is now contended that the Wells Company had the power to agree that if the defendant would allow it to sell cotton, a part of the purchase-money might be invested in the stock of the mill, and that this contract would be legal and a mere incident to the business. We submit that this is a distinction too fine to be appreciated.

But we have argued the question upon the assumption that the stock was taken for the benefit of the Wells Company. Such, however, is far from the fact. We have endeavored in the former part of this brief to show that everything connected with the transaction proved that if any stock was subscribed for it was by W. L. Wells and for his individual and personal use and benefit. If this is true, then we do not understand counsel for plaintiff in error to deny that it was an *ultra vires* contract. No lawyer would contend that a corporation could lawfully and within its legitimate powers agree that $50,000 of its assets should go in payment of the individual subscription of one of its agents to stock in another corporation.

Authorities are not needed, but we refer to the following as showing that all such contracts whereby the corporation diverts its funds into any venture for the benefit of an individual or becomes surety for another, or the like, are *ultra vires* and void:

Clark & Marshall, Corp., sec. 184.

Lucas *vs.* White Line Trans. Co., 70 Ia., 551; 59 Am. St. Rep., 454.

Best Brewing Co. *vs.* Klassen, 185 Ill., 27; 76 Am. St. Rep., 26.

In Pearce *vs.* Mad. & Ind. R. R. Co., 21 How., 441, the court said that the public (and, we may add, particularly creditors) have "an interest that neither the managers nor the stockholders transcend their authority," and it was held that the act complained of in that case was *ultra vires* and void, because this "diverted their capital from the objects contemplated by their charters and exposed it to perils for which they offered no sanction."

Now, applying the reasoning of these cases, we submit that there never was a better illustration of the wisdom of the doctrine announced than the case at bar. According to the contention of the plaintiff in error, the contract contemplated that the assets of this corporation to the amount of $50,000 should be invested in stock in a corporation which is now defunct and insolvent, while the bank in Vicksburg, to which the company now owes $27,000 (p. 37), must stand by powerless, and this, too, notwithstanding the fact that Love had written the Wells Company that he would pay for the cotton and Wells had communicated this fact to the bank (p. 119).

Assuming, then, that we have shown that the contract in reference to the application of the funds of the Wells Company in payment of the Loray stock was *ultra vires*, we submit that the whole plea of the plaintiff in error as to payment is thereby "plucked up by the roots." This will appear from the following corollaries:

(1.) *If the contract was ultra vires, then it was absolutely void and was not capable of being ratified.*

If this proposition be true, then we submit that it completely disposes of all the contention in this case that there has been in any way a ratification of the agreement to appropriate the funds of the Wells Company in payment for stock in the Loray mills. This will appear from the following authorities:

In Central Trans. Co. *vs.* Pullman Car Co., 139 U. S., 59, it is said:

"A contract of a corporation which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. *The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.*"

This language was also cited and expressly approved in Jacksonville M. P. R. & Nav. Co. *vs.* Hooper, 160 U. S., 514, 524, 530.

As said in McCormick *vs.* Market Nat. Bank, 165 U. S., 550:

"The doctrine of *ultra vires* by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law!"

All of the cases just cited are affirmed, commented upon, and the doctrine enlarged in the recent case of Cal. Nat. Bank *vs.* Kennedy, 167 U. S., 362, and we invite the careful attention of the court to this case in which the Supreme Court of the United States, after exhaustive opinion, overruled the Supreme Court of California.

(2.) *If the contract was ultra vires, then the Wells Company, even though it claimed benefits under the contract, was not estopped to contest it.*

We have contended throughout the case that the contract was not for the benefit of the Wells Company, but conceding for the sake of argument that W. L. Wells Company took benefits under the contract, and did so with full knowledge of all the facts, yet this would not prevent the company from contesting the validity of the *ultra vires* contract.

We are aware that upon this point there is a great divergence of authority, and we may admit that a large number of the State courts hold the contrary of the proposition stated above. But it is sufficient for us that in the courts of the United States, and particularly in the Supreme Court of the United States, the doctrine is laid down most emphatically that a corporation cannot be estopped from contesting an *ultra vires* contract upon the ground that it has received benefits under the contract.

In the case of Cal. Nat. Bank *vs.* Kennedy, 167 U. S., 362, there was an appeal from the Supreme Court of the State of California, and the case will also be found in 101 Cal., 495. The California Supreme Court had held that the bank, having received dividends upon the stock which it had purchased in another corporation, was thereby estopped to contest its liability as a stockholder; but the Supreme Court of the United States overruled the Supreme Court of the State of California and held, in the clearest and most explicit manner, that, according to the rulings of that court, the receipt of benefits by a corporation did not stop it from denying its liability on an *ultra vires* contract.

To the same effect is the First Nat. Bank *vs.* Hawkins, 174 U. S., 367, overruling 79 Fed., 51, and 82 Fed., 301.

The reason for this rule is clearly stated by the Supreme Court of Illinois in Nat. Home B. & L. Asso. *vs.* Home Sav. Bank, 181 Ill., 35, where the court says:

"If there is no power to make the contract there can be no power to ratify it; and it would seem clear that the opposite party could not take away the incapacity, and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power."

This doctrine is not confined to public corporations nor to corporations which are *quasi-public*. In Park Hotel Co. *vs.* Bank, 86 Fed., 742 (C. C. A.), the doctrine was applied to hotel companies, and in Davis *vs.* Old Colony Co., 41 Am. Rep., 221 (Mass.), it was held to apply to a manufacturing or trading corporation.

The rule is not different, because, as claimed by plaintiff in error, this is an executed contract.

It is urged that the contract is already *executed*, and that therefore, even if *ultra vires*, the court will not disturb it. An analysis of the case will show that this position is untenable.

The plaintiff in error does not claim that it paid the $50,000 to the Wells Company, but it claims that it turned the money over to the Loray mills in payment of a stock subscription, and it now relies upon a *ratification* on the part of the Wells Company to support its contention that the court should allow this credit. The plaintiff in error comes into court and says:

"I admit I have not paid the amount which the plaintiff sues for, but I claim that I paid the sum of $50,000 to the Loray mills. I admit I had no authority for this payment, but I contend that after the Wells Company had knowledge of what I had done, it did not repudiate the act, but by silence acquiesced in it, and this in law amounts to a ratification, and I asked the court to allow me credit for the $50,000 paid."

It will be seen that in order to sustain this contention it must rely upon the *ratification* of an *ultra vires* act. We have shown that by the decisions of the Supreme Court of the United States the contract, being wholly void, cannot be ratified, and hence the contention of plaintiff in error must fall to the ground.

As said by the court in McCormick *vs.* Market Nat. Bank, 165 U. S., 549, there is an "obligation on any one contracting with a corporation to take notice of the legal limits of its powers," and hence Love is held in law to have known that no acquiescence or other act on the part of the Wells Company could amount to a ratification, because, as said in Central Trans. Co. *vs.* Pullman Car Co., 139 U. S., 159, "the contract cannot be ratified by either party because it could not have been authorized by either. *No performance on either side can give an unlawful contract any validity.*"

If, then, this ratification has no validity whatever, how can it be claimed that this is an executed contract, and that the Wells Company cannot, for that reason, now avoid the alleged ratification?

But was this an *executed contract?* If it was *executed, when* and *how* was it executed? It certainly was not executed on December 3, 1900, when Love alleges that he balanced the books and turned the money over to the Loray mills, because by the undisputed evidence and by Love's own admissions he gave the Wells Company no notice whatever of this unlawful and wrongful appropriation of this money.

The only answer that can be made is that it became executed not when the money was paid over to the Loray, but when the Wells Company by *acquiescence ratified it*—that is, if it was ever executed at all, it was only by virtue of the *ratification*. Therefore if the Wells Company was absolutely incapable of ratifying the act, and particularly if it could have ratified it by mere acquiescence, it must follow that there has never been any ratification, and that the contract has therefore never become *executed*. As said by Biddle, J.,

in Tippecanoe County *vs.* La Fayette R. R. Co., 50 Ind., 86, speaking of ratification of an *ultra vires* act of a corporation, "*A void act can never become valid merely because it remains unquestioned,*" or, as said by the Supreme Court of the United States in the many authorities cited above, an attempted ratification of an *ultra vires* act of a corporation is an absolute nullity.

There are cases in which courts have said that they will not interfere with the executed *ultra vires* contracts of corporations. The reason of this is that, these contracts being unlawful, the court will not interfere, but will leave the parties *in statu quo*. The case at bar, however, differs most essentially from these cases. In our case it is the defendant that is seeking to *enforce a contract, to wit, a contract of ratification*, and, as this attempted act of ratification was unlawful and therefore a nullity, it must follow that the plaintiff in error can claim no benefit under such attempted act, because "no performance on either side can give an unlawful contract *any validity*."

Central Transp. Co. *vs.* Pullman Car Co., 139 U. S., 159.

Why Judge Boyd Directed a Verdict for the Plaintiff.

Taking the evidence in this case in its strongest light for the defendant, it must be admitted that the defendant wholly failed to show any authority in W. L. Wells to make the alleged agreement, and upon the question as to whether the Wells Company had ratified the agreement there was but a bare and unsatisfactory inference to be drawn from the delay or failure of the Wells Company to make demand. We submit that no circuit court judge could have allowed a jury to find that the Wells Company had with full knowledge ratified the act, even if these inferences had been given all the weight it was possible to attach to them, and even if there had been no testimony to the contrary. We have in

the foregoing brief discussed the various aspects of the evidence upon this point and will not here repeat it.

The final question presented to the circuit judge was whether he would permit a jury to find that the Wells Company had with full knowledge ratified the act when the only possible evidence to support this was an inference to be drawn by the jury, and when over against this the plaintiff produced the testimony of John T. Wells, clear, convincing, uncontradicted, that the company did not have knowledge of the facts and had done nothing which could constitute ratification. The only ground upon which the judge could have permittad a verdict for the defendant was that he would permit the jury to find that John T. Wells had testified falsely. He saw no reason to do this, and he therofore directed a verdict for the plaintiff.

We again call the attention of the court to the cases of Fresh *vs.* Gilson, 16 Pet., 327, and Hurley *vs.* Watson, 68 Mich., 532, in which will be found full discussion of the duty of a judge where inferences or presumptions are brought in conflict with direct, positive, and uncontradicted testimony. These decisions are to the effect that the judge must direct the verdict in accordance with the direct, positive, and uncontradicted testimony.

For the convenience of the court we cite below some of the decisions of this court in regard to the duty of the trial judge in respect to directing a verdict.

In Patton *vs.* T. & P. R. R. Co., 179 U. S., 658, Mr. Justice Brewer says:

"That there are times when it is proper for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it' (citing cases). It is undoubtedly true that cases are not to be lightly taken from the jury;

that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. (Richmond & D. R. Co. *v.* Powers, 149 U. S., 43; 37 L. ed., 642; 13 Sup. Ct. Rep., 748.) Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

In Delaware, L. & W. R. Co. *vs.* Converse, 139 U. S., 460, Mr. Justice Harlan says:

"But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. (Citing cases.) 'It would be an idle proceeding,' this court said in North Pennsylvania R. Co. *v.* Commercial Bank, 123 U. S., 727, 'to submit the evidence to the jury when they could justly find only in one way.'"

In Pleasants *vs.* Fant, 89 U. S., 116, Mr. Justice Miller states the law as follows:

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a

verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

In North P. R. R. Co. *vs.* Com. Nat. Bank, 123 U. S., 727, Mr. Justice Field says:

"There is no doubt of the power of the circuit court to direct a verdict for the plaintiff upon the evidence presented in a cause, where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict, if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

CONCLUSION.

Finally, we submit to the court that no wrong or injustice can be done in the affirmance of this judgment. Whatever the defendant, through its agent, Love, may have done in using its funds in paying W. L. Wells' individual subscription to the stock of the Loray mills was done without any authority from the Wells Company. He does not even claim to have given notice of the $40,000 payment which he alleges

was made on the 3d of December, 1900, until more than thirty days after it was paid, so that it is plain that even if the Wells Company had had full notice of what was done its failure to repudiate the act already done by Love in transferring these funds would not have been prejudicial to the defendant.

If the defendant has any claim it is against W. L. Wells, and the defendant should be required to pursue its remedy against W. L. Wells. The evidence shows that he is abundantly solvent, and if he made this subscription and directed this payment of the defendant's funds he is personally liable, and in an action between the defendant and W. L. Wells all the letters and conversations between Wells and Love will be competent, and the issue between them can be settled and the defendant recover every dollar that is justly due it. In this respect the case is exactly like that of Hurley vs. Watson, 68 Mich., 532, already cited, in which the court called attention to the fact that the defendant would still have his right of action against the agent whose personal debt the defendant had sought to pay out of the proceeds of property of the plaintiff which the defendant had purchased.

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